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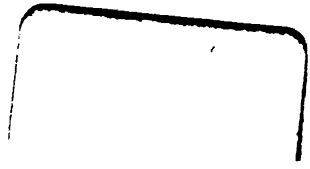

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## Volume 4

## 1895

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# MICHIGAN LAW JOURNAL

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# MICHIGAN LAW JOURNAL.

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## *COMPENSATION OF SPECIAL ADMINISTRATORS.*

HON. CYRUS E. PERKINS.

The subject of the Compensation of Special Administrators is peculiar and interesting from the fact that in our State no statutory provision for such payment is to be found in direct terms.

At common law executors and administrators were entitled to no compensation and as our Probate Courts are creatures of the statute and their duties and powers defined and limited thereby it has been questioned whether special administrators can be allowed anything for their services as such, in the absence of any statutory provision in their behalf. Such a conclusion would result disastrously to the interest of estates and is not to be conceded unless there be no escape.

It is true that by the doctrine of the courts of "ye olden tyme" all trustees were said to hold their positions for honor rather than for profit, and lest the honor of it should be lost sight of by question of accompanying profit all compensation was thought derogatory. This doctrine has long been outgrown, it having been long since discovered that to secure the faithful, economical and upright administration of business matters by those comptent to do so there must be adequate compensation provided. And it has long been the policy of the Courts to allow to the faithful trustee a due reward for his services. If special administrators are made an exception by reason of the present imperfection of our statutes, then amendment is surely desirable at once.

The statutory provisions already existing are confined in terms to executors and administrators. By these provisions such officers are entitled to receive (1) their *per diems*, (2) their commissions, (3) extra compensation for extraordinary services or in cases of unusual difficulty or responsibility.

The question to be determined then is: Do these sections of the statute apply to special administrators? We commonly find the words executors and administrators used as a general term in the statutes, but there are in fact five different kinds known to the law, viz:

1. General administrators, being the regular appointment in cases of intestacy.

2. Administrators with the will annexed, appointed where no executor is named in the will, or when executor does not accept, or when after accepting he dies, resigns, or is removed.

3. Administrators *de bonis non*, appointed when general administrator dies, resigns, or is removed, before completing administration.

4. Special administrators, appointed by reason of delay in granting general administration.

5. Temporary administrators, appointed where persons are absent or missing with whereabouts unknown, leaving property going to waste.

The duties of the three first named classes are practically the same, viz: To collect the assets, pay the debts, and distribute the residue among the heirs and legatees. Special administrators may and not infrequently do have the same duties; although most generally they are confined to a collection of the estate and the preserving of it until the executor or general administrator qualifies. A special administrator may, however, under special orders of the Court, maintain suits, sell property, pay claims and distribute the estate, performing practically all the duties of administration.

As we have shown that there are numerous kinds of administrators performing substantially like duties, while the statutes prescribing compensation use only the general terms executors and administrators, it would seem that all administrators without regard to the qualifying terms preceding or following the word, should be entitled to like pay for like services, and that this is the proper construction of the law, that is to say, every administrator, whether general, special, *de bonis non*, or with will annexed, is entitled to the statutory fees whenever his work is of the character prescribed, and the prefix "special" is no more a proscriptive limitation to such compensation than the word "general" or "*de bonis non*."

This being conceded, a further difficulty arises in determining upon what basis his commissions shall be computed. The statute provides that executors and administrators "shall be allowed commissions upon the amount of personal estate *collected and accounted for*, and of the proceeds of real estate sold under an order of the Court for the payment of debts, as follows: For the first thousand dollars, at the rate of five per cent., for all above that sum and not exceeding five thousand dollars, at the rate of two and one-half per cent., and for all above five thousand dollars, at the rate of one per cent."

The problem arises as to the proper construction of the words emphasized by me, "collected and accounted for." It is contended with some ingenuity that the special administrator has collected the personal assets of an estate when he has reduced them to his possession and control; and that therefore when he accounts for them and turns them over

to his successor, he is entitled to his commissions. It is urged that the statute providing for his appointment recites that, "he shall collect all the goods, chattels and debts of the deceased, and preserve the same for the executor, etc.," thus using and defining the very word "collect" in controversy. And again it is urged that the question of *quantum meruit* does not enter into the argument, it being a statutory provision which confers a right to the commission without respect to labor expended or service rendered, and the Court cannot withhold them. Therefore it is urged that special administrators are properly entitled to receive their commissions on all the personal assets, goods and chattels which they take into their possession, account for, and deliver to their successor.

However plausible this construction, it is manifest that it would often defeat the very purpose of the appointment of a special administrator, to-wit the saving of the estate, and "waste at the bung-hole while saving at the spigot." It might easily happen that several partial administrations of the same estate might occur, as: a special administration, an administration with will annexed, followed by one or more administrations *de bonis non.* If each in succession could be allowed full commissions upon the same assets, the estate might be eaten up in commissions.

Is it not more reasonable and more in consonance with the maxim that "the intent of the law is to do justice" to so construe the cited provision as to hold that the words "collect and account for" mean in fact to fully administer, i. e., to receive and disburse, either in payment of debts and expenses, or in distribution to the parties entitled thereto as heirs, distributees or legatees.

If this view be correct and a special administrator cannot show such receipts and disbursements, either his duties must have been light, or, if otherwise, the character of his services must have been unusual or extraordinary. If the former, he ought not to receive much; if the latter, the court can award special compensation.

There has been no authoritative decision upon this subject in this State, and the writer has found much variance of opinion in the Courts of other states; but after a careful survey and consideration of all sources of information available the conclusion stated above is reached. That special administrators are entitled to compensation, within the equity of the general statute providing compensation for executors and administrators; and that such compensation, so far as commissions are concerned, must be determined upon the amount of the estate that has been fully administered, and that he is not entitled to charge commissions upon that portion of the estate which he merely receives and turns over to his successor.

## *PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE ASSOCIATION OF JUDGES OF MICHIGAN.*

The second annual meeting of the Association of Judges of Michigan, was held at the Supreme Court room at Lansing, on December 27 and 28.

The following judges responded to the roll call: Judges Grant and Montgomery, of the Supreme Court; Judges Frazer, Hosmer, Carpenter, Smith, Moore, Davis, Lane, Buck, Hubbell, Lillibridge, Russell, Eldridge, Grove, Adsit, McMahon, Padgham, Dodds, Kinne, Person, Aldrich, Peck, Daboll, Corbett and Vance, of the Circuit Judges; and Judge Burlingame, of the Superior Court of Grand Rapids.

Judge Russell, president of the association, delivered an excellent address upon the duties of trial judges and methods of procedure in courts. Judge Frazer, of Detroit, discussed "The Judge and the Juryman." He favored the idea of commissions who should determine whether the men who were returned as jurors had the requirements contemplated by the statute. This paper was discussed by Judges Burlingame, Vance, Aldrich, Buck, Moore and Hosmer, and was referred to the committee on legislation.

Governor Rich presented a thoughtful paper upon the subject of "Sentences and Pardons;" for the first offence he thought judges should impose short sentences, for a second offense a longer sentence. A third conviction would indicate that the offender had joined the criminal class, and a long sentence should be imposed. He also thought that a brief record of the facts in criminal cases should be put on file for the use of the Pardon Board and the Governor.

He called attention to the crowded condition of the State prison and he advised that long time men be sent to the Marquette prison where there was room for their accomodation. His suggestions were discussed by Judges Vance, Russell, Frazer, Buck, Burlingame and Grove, and upon motion of Judge McMahon were referred to the committee on legislation.

Some phases of judicial life were presented in an interesting and instructive way by Judge Kinne. He spoke of the criticism by the lawyers of the motives of judges in the decisions they render, and deprecated that it existed. He also condemned the interruptions and exceptions taken unnecessarily by attorneys when opposing counsel are making their arguments, and advocated a large latitude in the arguments of counsel as long as legitimate.

Judge Carpenter, of Detroit, discussed the question of "Naturaliza-

tion" and read an exceedingly able paper. His views were discussed by Judges Frazer, Hubbell, Burlingame, McMahon, Moore, Buck, Grove, Vance, Dodds and Lane, and referred to the committee on rules to report as speedily as possible.

Friday morning Judge Buck read a paper discussing the subject of "Indeterminate Sentences."

Judge Burlingame's paper on "Crimes and Criminals" was then read and the two papers were discussed together by Judges Daboll, Grove and Aldrich.

Judge McMahon presented the report of the committee on legislation. They reported on Judge Frazer's paper, which advised the appointment of commissioners to pass upon the qualifications of jurors, and did not favor his conclusions, but a more careful observance of the provisions of the law as it now is. The report was adopted. The committee also reported on the address of Gov. Rich. In relation to the preparation and filing by trial judges of a concise history of criminal cases, a majority of the committee recommended the enactment of a law carrying out the suggestions of the Governor. The minority of the committee thought that the proposed changes were unnecessary and should not be made. The minority report was adopted.

The committee on legislation also offered the following:

*Resolved*, That it is the sense of this association that by statute, power should be given judges of the Circuit and Municipal Courts to appoint a court officer or crier with the power and authority of a deputy sheriff, The resolution was adopted.

The committee on rules made a report recommending the adoption of a uniform rule requiring notes of issue to be filed fourteen days before the first of the term. They also recommended the adoption of uniform rules in relation to the naturalization of aliens to carry out the intent of the resolution adopted the evening before reading as follows: "That all applicants for admission to citizenship shall with their witnesses be examined at such times as the several circuits shall by special rule of Court designate. That no applicants should be admitted to citizenship without the personal examination by the Court of the applicant and his witnesses as to the truth of the statutory requisites; that no Court should admit an applicant to citizenship living outside of the circuit in which the application is presented or in which the applicant has not resided for at least one of the preceding five years. That no Court shall hear an application unless a petition therefor shall have been filed with the clerk of the Court at least ten days before such hearing." The report of the committee was adopted.

The following officers were elected: President, Hon. Wm. E. Grove; Vice-president, Hon. Rollin H. Person; Secretary and Treasurer, Hon. Victor H. Lane.

The following resolutions were also adopted:

*Resolved*, That Judge Rollin H. Person be appointed a committee to arrange for and bring about the publication of the proceedings of this meeting in convenient form for distribution among parties interested, at the expense of the State.

*Resolved*, That the thanks of the association be tendered to Hon. Fred J. Russell, retiring president; Hon. S. B. Daboll, vice-president, and Hon. J. B. Moore, secretary and treasurer; for their careful and efficient service as officers of the association during the first year of its existence.

The meeting then adjourned.

J. B. MOORE,
Secretary and Treasurer.

# *NATURALIZATION.*

HON. WILLIAM L. CARPENTER.

Of the decision of a court admitting an alien to citizenship, Chief Justice Marshall, speaking for the Supreme Court of the United States (*Spratt vs. Spratt, 4 Peters 407*) says: "It seems to us if it be in legal form, to close all inquiry and like every other judgment to be complete evidence of its own validity."

No right to review this judgment by appellate proceedings is given by the statute, or so far as I can discover, has ever been assumed. It is even doubtful if the court which rendered that judgment has any power to vacate it. (*U. S. v. Norsch, 42 F. R. 418.*) It was decided in the case last cited that the United States Circuit Court in equity would advocate such a judgment in a suit brought by the Attorney General of the United States on proof that it had been procured by false testimony, trick or artifice. It was held, however, not sufficient to prove that the judgment was erroneous, nor that the applicant was not entitled to citizenship, nor even that he knew he was not so entitled. As a result, and I state this after careful examination, I can find no record that any judgment admitting an alien to citizenship was ever vacated. As this judgment is practically final as well as conclusive, it rests entirely with each court to determine what facts the applicant must prove, and the method by which he must prove them. In other words the power of the Court passing on applications for citizenship is practically omnipotent.

This power of inferior courts, this lack of decisions by appellate tribunals coupled with the fact that aliens have hitherto had all the privileges and not all the burdens of citizens, has afforded poor opportunity for the establishment of such a method of naturalization as the law contemplates.

The recent amendment to our Constitution will speedily have the effect of excluding from the right of suffrage all except citizens. This makes the duty of naturalization a serious duty. Naturalization will thus confer a privilege on the applicant, and confer it, too, at the expense of those who are already citizens. The applicant will be invested with the right to vote and the effectiveness of the votes of those already possessing the right will be correspondingly diminished.

The serious character of this duty, the loose methods at present prevailing, our responsibility for and power to reform these methods, makes naturalization a subject eminently appropriate for the consideration of this Association.

To entitle an applicant to a judgment admitting him to citizenship he must take the oath specified in Sub. 2, Sec. 2165 R. S. of U. S. and he must prove that he made the prior declaration required by Sub. 1 of the same section, and that he possesses the qualifications as to residence, character and attachment to the Constitution and Nation required by Sub. 3 of said section. The importance of these conditions demands their separate and detailed consideration.

(1.) Oath of applicant.

The applicant must declare on oath before the court that he will support the Constitution of the United States and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state or sovereignty and particularly by name to the prince, potentate or sovereignty of which he was before a citizen or subject. U. S. R. S. Sec. 2165, Sub. 2.

In respect to this declaration Judge Dallas, of the U. S. Circuit Court of Appeals, Third Circuit, in a recent opinion says: "Of the fact of making the declaration to support the Constitution of the United States, no extrinsic evidence is necessary, for it is made in the presence of the judge, but it by no means follows that the court is charged with no duty in respect to this declaration. It may safely be assumed that Congress in requiring it to be made before the court meant to assure its being made with decent solemnity; but more than this it is expressly provided that it shall be made "on oath," and therefore, in my opinion, it should not be accepted in any case in which upon examination it appears that the applicant does not understand its significance, or is without such knowledge of the Constitution as is essential to the rational assumption of an undertaking vouched by oath to support. In many instances these declarations are made by men who have no counsel to inform or restrain them and who themselves have no adequate appreciation of their purport or of the sacredness of the accompanying oath, which in order to accomplish the object in view they are often quite willing to take as a matter of course. I cannot shut my eyes to the existence of this abuse, nor regard as sufficient, under the statute, any oath which relevant questioning results in showing is not intelligently and conscientiously tendered." I take it a court may safely assume in cases of intelligent applicants that the oath to support the Constitution is taken with proper sincerity and with the intent to faithfully carry out the obligations thereby imposed. If the court is in doubt of the applicant's sincerity, it is clearly its duty to make proper inquiry. If as a result of that inquiry it becomes apparent that the applicant does not take this oath with sincerity; does not intend to carry out the obligations which that oath imposes upon him, his application should be rejected. It it appears that the applicant has no conception of the obligations his oath impose upon him, then clearly this oath should not be administered, until he is made to understand, possibly

by instruction of the court, what those obligations are. The interests of the Nation and of the applicant are alike disregarded, if, when this solemn oath is taken, the latter is ignorant of the obligations he swears to perform.

(2.) Prior declaration.

Unless his is one of the cases in which a prior declaration is dispensed with, the applicant must prove to the court that at least two years prior thereto he declared on oath before a clerk of a court of Record his intention to become a citizen and to make the renunciation contained in his oath. This prior declaration may have been taken by the clerk outside of and away from his office. *Andres v. Circuit Judge, 77 Mich. 89.* In Re Langtry, 31 F. R. 879, decided by Mr. Justice Field, of the U. S. Supreme Court, is, however, an authority holding exactly the contrary.

(3.) The applicant must also prove that he has resided in the United States five years and in the State or Territory in which the court is held one year, "but the oath of the applicant shall in no case be allowed to prove his residence." R. S. Sec. 2165, Sub. 3. It has been decided that the applicant's oath is not merely insufficient to prove his residence, but it is so devoid of the character of testimony that even if false, perjury cannot be assigned upon it. *U. S. v. Grottkau, 30 F. R. 674.*

In the case of Cumming's Petition, 41 N. H., 270, it was held that the provision as to residence was complied with if the applicant had resided any one of the five years in the State. (In that case, however, the applicant resided in New Hampshire at the time of his application.) It would follow from this reasoning that if the applicant was at the time of his application a resident of Ohio, he would bring himself within the provisions of this statute, if he had lived any one of the last five years in Michigan. I will not presume to quarrel with so high a tribunal as the Supreme Court for the State of New Hampshire, but I do not think any court in this State should assume jurisdiction to pass upon the application for citizenship of a non-resident of this State. Assuming the correctness of the New Hampshire case, it would still not be obligatory on State courts to entertain jurisdiction. *Kentucky v. Denison, 24 How. 66.*

In any event only our own State authorities could compel us to entertain such jurisdiction, and no state authority is likely to contend or decide that the courts of this State should spend their time in making citizens of another State.

The provision under discussion does not require the applicant to reside within the jurisdiction of the court passing on his application. An article in the *Philadelphia Press* of Oct. 5, 1894, states that 2,000 alien residents of Philadelphia were naturalized by the court of an adjoining county and that a protest from the grand jury caused that court to make an order refusing naturalization to non-residents of the County.

(4.) The applicant must also prove: That during his five years' res-

idence in the United States he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. R. S. 2165, Sub. 3. He has not behaved as a man of good moral character if he has been convicted of the crime of perjury, even though he was subsequently pardoned. *In Re Spencer, 5 Sawyer 195.* In general it may safely be said if the applicant has been convicted of a crime involving moral turpitude or has behaved like one guilty of such a crime he is excluded under this clause.

After quoting the foregoing provision the Supreme Court of Utah (in the matter of Kanaka Nian, 21 P. R. 993) say: "The man intrusted with the high, difficult and sacred duties of an American citizen should be informed and enlightened; he should have sufficient intelligence to discriminate right from wrong in political matters, and should possess a feeling of moral obligation sufficient to cause him to adopt the right. In the law quoted, Congress exhibited an intention to admit to citizenship aliens of a good moral character, attached to the principles of liberty and justice contained in the Constitution, and desirous of the public good, and to exclude aliens who live immoral lives and disregard moral principles, who are in favor of despotism and are indifferent to or opposed to these institutions upon which the welfare of all depends. They intended to exclude the immoral; those who were opposed to the principles of liberty and justice and are in favor of anarchy and confusion. No one should be admitted who has not sufficient intelligence to understand the principles of government, which rest in part upon his will. It does not appear to the satisfaction of the court that the applicant understands the principles of the Constitution of the United States or its institutions sufficiently to become a citizen."

Judge Dallas, in the opinion heretofore cited, immediately following his discussion of the oath heretofore quoted, says: "Furthermore the law requires that it shall be made to appear to the satisfaction of the court that the applicant has behaved as a man attached to the principles of the Constitution, and bearing this in mind with what has already been said, the conclusion would seem to be inevitable, that the court ought not to admit any alien to citizenship without being satisfied that he has at least some general comprehension of what the Constitution is and of the principles which it affirms." I do not cite these opinions as decisive. I am well aware that it can be contended that a man can behave as one attached to the principles of the Constitution of the United States without any acquaintance with that instrument just as easily as one can behave morally without an acquaintance with the doctrines of moral philosophy. But these views, if they are extreme, serve to call our attention to language which I think has frequently passed unnoticed. If that language does not mean that the applicant should have a knowledge of the Consti-

tution, it at least means that he should have behaved as if he loved its principles. One who has consorted and acted with the enemies of the United States; one who has supported anarchial or any other movement directed against Government; one who has in any way exhibited contempt for or hatred to the principles of our Constitution or to our Nation has not behaved as a man attached to the principles of the Constitution of the United States, and as a man well disposed to the good order and happiness of the same, and is not entitled to citizenship.

(5.) Nearly all applicants seeking citizenship without having made a prior declaration base their claim on the ground that they came to the United States when they were under age. An applicant of this class must not only do all required of applicants who have made such prior declarations—excepting, of course, to prove the making of such prior declaration—but he must also prove that he is at least twenty-one years old; that he came to this country under eighteen years of age; that he has resided here continually since, that the entire period of such residence is five years, and that for the two years next preceding it has been his bona fide intention to become a citizen of the United States. R. S. U. S. Sec. 2167.

It appears therefore that the statute of naturalization requires that an applicant for its privileges should have behaved during his five years' residence in this country as a good man, and as a good citizen and that his fidelity in the future shall be assured by his oath to support the Constitution. To insure the admission of worthy and the rejection of unworthy applicants, the statute provides for a judicial investigation of each application by a court.

Unfortunately the statute marks out no method by which the court shall conduct this investigation. It remains for the courts therefore to discover and put in operation a proper method of proceedure. That method should be the one best calculated to bring before the court all the facts bearing upon the questions under investigation. Says Judge Dallas in the opinion heretofore cited: "An applicant for naturalization then is a suitor who by his petition institutes a proceeding in a court of justice for the determination of an asserted right. Every such petition must of course allege the existence of all facts and the fulfilment of all conditions upon the existence and fulfilment of which the statutes which confer the right asserted have made it dependent.

But the presentation of the petition merely brings the matter before the court and the burden rests upon the petitioner to establish its material allegations by such evidence as the law has made requisite, and which is needed to satisfy the judgment of the Court. Without this there can be no such judicial inquiry into the case as the act of Congress contemplates. In short the application must be supported by legal proofs of the facts on which it rests; the proceedings are strictly judicial. The alien who applies for admission asserts on his part a compliance with the conditions

and he must furnish the requisite proof of what he asserts, or he establishes no right." Says Chief Justice Marshall in *Spratt v. Spratt, 4 Peters 407:* "They (the courts) are to receive testimony, to compare it with the law and to judge as to both law and fact." The testimony required must be of a legal character. Ex parte affidavits are insufficient. It is scarcely necessary to quote a decision to the effect that a clerk cannot perform the judicial duty of passing upon these applications. Such a decision, however, exists. See in the matter of *Clark, 18 Barbour 447.* It follows from the decision just quoted, as well as from general considerations, that the witnesses in these matters should take the witness stand and testify to facts relevant to the question under investigation. The practice of permitting the witnesses to testify in the language of the statute is, in my judgment, a vicious one. To accept the general statement of a witness that the applicant is a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, is in effect to require no testimony whatever upon these material facts. At the most, such a witness can be held only to the good faith of his opinion. His acquaintance with the applicant may be so limited as to make that opinion, no matter with what faith it is held of no value whatever. In other words he may have no such knowledge of the applicant's behavior as to justify his expressing an opinion. It may happen that notwithstanding knowledge by the witness of very improper conduct of the applicant, motives of kindness induce favorable testimony. The applicant may, according to the witness's standard, have behaved as a man of good moral character, when according to the standard that the court would apply; he has not so behaved at all. In other words, under this system, the standard which each witness has in his own mind and not the standard which the law requires, determines the judgment of the court. The judicial function "to receive testimony, compare it with the law and judge, both as to the law and fact," is delegated to every witness who comes into court. There ought in these cases to be afforded an opportunity for the introduction of all material evidence, whether favorable or opposed to the claim made by the applicant. Testimony bearing on the questions involved, whether it comes from the mouths of witnesses selected by the applicant or from others having an acquaintance with the facts should be received. To afford this opportunity obviously demands a reformation as to the time and place of hearing such applications as well as in the method of conducting them. Those applications should be heard in the court within whose jurisdiction the applicant resides. They should be heard only on stated occasions, as on a stated day each week, each month, or each term, as the case may be. They should not be heard until that applicant's petition stating the facts upon which he bases his claim and specifying his residence with the utmost

particularity, has been on file for a stated time with the clerk of such court. This will give any one who has an interest adverse to that of the applicant some opportunity to be heard. Party and other organizations will, I believe, take advantage of this opportunity and thus all the material facts will be brought before the court. By "comparing these facts with the law, and passing judgment thereon," the court will do its duty as contemplated by the naturalization law. Every one concerned, but more than any other, the applicant himself will reap the benefit. To become a citizen he will truly make himself worthy of citizenship. The judgment admitting him to citizenship, because it will really be evidence that he is worthy of citizenship, will tend to give him a standing as such in the community. In short the proceedings ending in the naturalization of an alien should at once tend to make him, and to prove to others that he is a true American citizen.

Whether the proceedure suggested in this paper does or does not meet your approval, I am sure you will agree that our present method of naturalization demands reformation and that such a reformation will be practically accomplished when this Association recommends a proper system of proceedure. If this paper shall to any extent contribute to the establishment of such a system it will accomplish its purpose.

## *COMPUTATION OF TIME—THE LEGAL METHOD.*

O. ELMER BUTTERFIELD.

Section 1298 of Howell's Annotated Statutes of the State of Michigan provides that in certain cases the commissioner of highways shall issue a written notice appointing a time and place of hearing, which notice shall be served "at least ten days before the time of hearing." In the foot note to this section it is said that in counting the time, the day of service and the day of hearing are both excluded, citing the case of *Platt v. Commissioner of Clay*.[1] The entire text of the opinion in that case reads as follows:

"MARSTON, J.—Tke commissioner of highways caused a notice to be served on Platt December 31, 1875, that a meeting was to be held at a certain place on January 10, 1876, to ascertain and determine the necessity of laying out a certain highway. The statute, Public Laws of 1875, p. 92, Sec. 1283, requires the notice to be served 'at least ten days before the time of said meeting.' This language excludes the day on which the meeting is to be held, and requires ten full days notice, and under the well settled rule in this State, under such a requirement, the day of service is also excluded.[2] The commissioner has no jurisdiction, and the proceedings must be reversed and quashed, with costs. The other justices concurred."

The case of *Salee v. Ireland*, cited by the court, holds that the statute[3] which requires the summons therein mentioned to be made returnable not less than three days from the issuing thereof, excludes the day of issuing the summons, so that a summons issued on the ninth of the month, cannot be made returnable earlier than the thirteenth; and it also holds that the statute requiring the summons to be served at least two days before the return day thereof, necessarily excludes from computation the day of the return, and that a summons returnable on the twelfth must be served as early as the ninth. The other case cited in the opinion quoted, *Warren v. Slade*, holds that an action commenced by summons on March 15, 1869, upon a judgment rendered in a court of record on March 15, 1859, is not barred by the statute which provides that every action upon such a judgment shall be brought within ten years next after the judgment was entered, and not afterwards, and that in computing the time upon such statute, the day the judgment was entered is excluded.

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[1]38 Mich., 247.

[2]Salee v. Ireland, 9 Mich., 157; Warren v. Slade, 23 Mich., 1.

[3]Comp. Laws, § 4987.

It appears that the court in the Platt case relied upon the case of Warren as a precedent for excluding the first day in the computation, and upon the case of Salee as a precedent for excluding the last day. It will be noted, however, that in the Platt case above referred to the court selected and relied upon the two cases just quoted, where other and dissimilar statutes were in question, and failed to make any reference whatever to the case of *Arnold v. Nye*,[1] where it was held in an opinion by Judge Cooley that in computing time upon a notice of an application for an order that a commission issue to take a deposition under the statute[2] which requires such notice to be served on the adverse party "at least ten days before the making of such application" (almost the exact words of the statute under consideration in Platt's case) the day of the service is excluded, and the day on which the application is to be made is included; and service on the fifth of the month of notice of an application to be made on the fifteenth was held sufficient; and also overlooked the case of *Eaton v. Peck*,[3] where *Arnold v. Nye* was cited with approbation.

In *Arnold v. Nye*, a distinction is drawn between a statute requiring service "not less than three days" before a certain time, which was the language in *Salee v. Ireland*, and a statute requiring "at least three days before" a certain time and it is concluded that *Salee v. Ireland* is not antagonistic to the doctrine that the last day should be included in the computation, in short, that it is not a precedent for excluding the last day as it was considered in the opinion of Judge Marston above quoted. And as will be hereinafter pointed out there is a very clear distinction between a requirement that service be made "at least two days before the return day" which was the language in the latter portion of the Salee case, and a requirement of service a certain number of days "before the return" or before any other act.

The Platt case then is left without a precedent in this State; and yet during all the years from 1879, when the decision was rendered, until 1892, when Judge Long in the case of *Chaddock v. Barry*, finally put the matter to rights, although the question was often raised, the court steadily followed and re-affirmed the doctrine there laid down.

In *Lane v. Burnap*[4] in an opinion written by Justice Graves, the court construed a statute requiring a drain commissioner to serve certain notices "at least five days before the day appointed," to exclude both the day of service and the day appointed, citing *Platt v. Commissioner*. In *Coquard v. Commissioner*[5] the identical section of the statute considered

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[1]23 Mich., 286.
[2]Comp. Laws, 245.
[3]26 Mich., 57.
[4]39 Mich., 736.
[5]61 Mich., 445.

in Platt's case came before the court and it is said in an opinion by Justice Morse that the case is ruled by *Platt v. Commissioner* that both the day of service and the day of hearing must be excluded. And in *Rufenburg v. Muskegon*[1] it is held that a statute providing that the first publication of a notice of an application for the impaneling of a jury in condemnation proceedings should be made at least thirty days before the day of hearing, excludes the first day of publication and also the day of hearing. The court disregard the case of *Arnold v. Nye* and follow the Platt case, announcing in the opinion, after the apparent conflict in the cases had been urged upon its attention, that whenever condemnation of lands has been involved the decisions have excluded the last day as well as the first. But subsequent utterances of the court do not adhere to this distinction.

This brings up the case of *Chaddock v. Barry*[2] above referred to where the rule of computation of days again comes before the court and the day of service is excluded and the day of return included under a statutory requirement that "a summons shall in all cases except as hereinafter otherwise provided, be served at least six days before the time of appearance contained therein," and service on the twelfth of a summons returnable on the eighteenth, was held valid.

Quite a general review is made of the cases upon the subject and the the fact is noted that in *Platt v. Commissioner* and the subsequent cases above cited the rule laid down in *Turnpike Road v. Haywood*[3] which was followed in *Arnold v. Nye*, had been lost sight of; and it is held that hereafter the rule in *Turnpike Road v. Haywood* and *Arnold v. Nye* must be followed. The rule would then seem now to be that where an act is to be done a certain number of days before a day stated, then that day is to be excluded in the computation; but where the act is to be done a certain number of days before another act then the day on which that act is to be done is included.[4]

What a variation is here seen in the judicial view in the matter of the computation of time—a matter which the vice-chancellor of England said he should have thought "the simplest question in the world."

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[1] 83 Mich., 276.
[2] 93 Mich., 542.
[3] 10 Wend., 422.
[4] Turnpike Road v. Haywood, 10 Wend., 422.

# *TWO SUBJECTS THAT SHOULD RECEIVE CONSIDERATION BY THE NEXT LEGISLATURE.*

WILLIAM K. CLUTE.

## IV.

THE GIVING OF FREE PASSES TO PUBLIC OFFICERS BY RAILWAY COMPANIES.

Probably there is no form of bribery more common or more pernicious than this. It is morally an offense against public justice. Blackstone sums up in a few short phrases what it is, and its effects: "Bribery is the next species of offense against public justice; which is when a judge or other person concerned in the administration of justice takes an undue reward to influence his behavior in office," and Judge Cooley adds a note to this as follows: "The offense of bribery is not confined to influencing judicial officers. Any attempt to influence an officer in his official conduct, whether in the executive, legislative or judicial department of government by the offer of a reward or pecuniary compensation is an indictable common law misdemeanor." But the giving of passes by railway companies to public officer has become so common as to be but little noticed. Long acqaintance and familiarity with the practice has worked a sort of case-hardening process that causes us to notice the matter but little.

Alexander Pope's observation on human nature was quite true when he said that:

> "Vice is a monster of so frightful mein;
> As to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."

But for all this, a little awakening on the subject may not be out of place. I believe that legislative, executive and judicial officers, during their terms of office should be prohibited by law from accepting free transportation on railroads operating in this State, and that this Association might appropriately petition the legislature for the enactment of a law to that effect.

It is reasonably well known that our judges are very free from this evil. Any judge with a clear cut perception of right and wrong will refuse one. Why? Because he knows that the railroad company may have a case in which he may be called to pass upon judicially. He knows that "all human experience has demonstrated beyond the shadow of a doubt that it would be putting human nature to a test altogether too severe to expect a wholly impartial exposition of law from a judge who was

himself pecuniarily interested in the result of a suit tried before him." He knows if he is well taught, that the contract implied between him and the railroad company giving the pass is this: The railroad company hereby delivers you this pass to ride over its line whenever you please, for and in consideration of your influence, opinion and official action in its favor whenever its interests are in jeopardy before you. The legislator accepts his pass on the same understanding. The public officer of high or low degree, wherever there is vested in him any power or discretionary action, receives a railway pass for and in consideration of official favors to be granted as occasion requires. Thus it is that the insinuating nature of this gigantic influence shapes the policy of public officers towards the most generous of bribe givers, the railroads of the State. Is it to be wondered at, that they are accused of not bearing their just proportion of taxation, and that unusual privileges and grants are included in their franchises? Their favors are paid for, are they not? Do they not thereby get what they impliedly contracted for when the pass was delivered? There seems to me to be no defense to the practice. It is a bribe in effect, and although the terms of the contract are only implied, they are well understood. It is unfair to other citizens, whose rights are as sacred to them as the railroad companies are to it. The wealthy corporation can buy favors of this class, and profit by it, but the average private individual who can not, even if moderately well off, "tip" the government officials, is placed at a disadvantage, and he is thereby denied the benefits of that old and venerated maxim of legal jurisprudence that "all men are equal before the law." I claim that all men are not equal before the law, neither its makers, executors or interpreters, when such public officers are transported during their terms of office over our railroads on free passes; and I respectfully submit that consideration of the matter by this Association may work out some good, and if any bill it may recommend upon the subject shall fail of becoming crystalized into law, the bar of the State will have at least put itself on record to its lasting credit.

## V.

The last change I wish to suggest relates to

### THE FEE SYSTEM IN JUSTICE COURTS.

It is well known to every one familiar with procedure in courts of justices of the peace, that the justice receives for his compensation and emoluments, fees paid by the parties litigant before him in civil causes, and by bills rendered to the board of supervisons and audited by them in the respective counties, in criminal cases; in both instances, the amount received depending on the work done. The practical workings of this plan is very unsatisfactory, not because of the smallness of the remuneration to the justice of the peace but for other causes more important than dollars.

Under this fee system the justices are not independent in a judicial capacity, they are constitutional officers under our judicial system. Their judicial discretion should be as unhampered by influences of a pecuniary character as a Circuit or Supreme Court judge. Their courts are nearer the masses of the people than any of the higher ones. I can not more appropriately express what I wish to say than to use the words of our ex-Circuit Judge V. H. Smith, in his address before an institute held here a few years ago. In speaking of Justice Courts he said that "it is intended by this Court to furnish a cheap and speedy trial, and the adjustment of differences wherein large amounts are not involved without incurring the expense and delay incident to a higher court. And it has some advantages. It is near the people in every township, and tends to some extent to keep alive an interest in legal questions and legal rights. But as a means for definitely settling disputes and ending litigation, it is not a success, and the Justice Court system as now constituted in this State, certainly to the bar generally, and, I think, to litigants, yields very unsatisfactory results. The entire justice court system in my judgment needs to be changed. The justice of the peace now gets his pay for his services in the way of fees allowed by law and taxed against the losing party, so that the amount of money that he receives depends upon the amount of work he does; and as he taxes no fees against any one unless some one begins a suit, there is a constant temptation before him to do something or throw out some inducement to parties controlling business to bring their suits in his court, and if they do patronize his tribunal then, of course, there is ever present to contend with the blind goddess of justice the demon of self-interest, prompting and tempting the court to favor the plaintiff, for if the plaintiff does not succeed in one Justice Court he may go to another; the defendant has no such lever with which to seek to move the court. I do not mean that all justices of the peace are corrupted by this system, I believe there are just and honorable men who hold this office, who would spurn such considerations of self-interest, and act impartially. Yet it has almost passed into a proverb among the lawyers, that a justice of the peace decides for the plaintiff, and almost invariably, I think, when a jury is demanded in this court (as it may be) it is the defendant who demands it. Thus removing the questions of fact in the case from the court to the jury. This system as to fees is radically wrong, no man should ever sit to decide between his fellows when his compensation directly or indirectly depends upon the result of the controversy."

What is the remedy for this? How can justices of the peace be lifted out of this undesirable situation, their judicial discretion be enthroned and the charges of influence by King Midas set at rest? Will it not accomplish the desired end if the legislature passes a law authorizing the board of supervisors in each county to fix a salary for each justice in the

county, to be paid by the county, in lieu of all fees, and which salary shall not be diminished during his term of office? It seems as if this, along with a reduction of the number of justices in some instances would help; and I throw out the suggestion, hoping to hear from others upon this, as well as the previous matters I have herein mentioned.

The subjects of revising practice in our courts, a general law for the incorporation of all cities in our State, and the good work of improving the character of our primary elections in party caucuses are already under way. It is to be hoped that they will receive such faithful attention as the respective subjects certainly merit.

# MICHIGAN LAW JOURNAL.

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## NOTES.

MR. CLUTE'S ARTICLE.—We were obliged through lack of space in our December number to delay the publication of a part of Mr. Clute's article, the part which appears in this issue. Mr. Clute advocates the abolition of the fee system in the justice courts, and all those who are familiar with its workings will entirely agree with him. There can be no doubt that the system is a bad one and should be done away with as speedily as possible. If the compensation of the justice is made to depend upon the number of cases tried by him, he is under the constant temptation of favoring the plaintiff. For if the plaintiff does not succeed before him he may go to another justice who will not be so scrupulous. The payment of salaries to justices as is done in the city of Detroit has proved satisfactory and should be adopted throughout the entire State.

IS NATURAL GAS IMPORTED INTO THIS COUNTRY SUBJECT TO DUTY?—Whether natural gas imported into this country from Canada by means of a pipe laid across a river is subject to duty under our tariff laws is a novel and somewhat interesting question. This is brought to our notice by the pipe which was recently laid between Windsor and Detroit to connect the natural gas wells of Ontario with the natural gas system of the latter city.

There are two paragraphs in the new tariff law under which natural gas might be classed. The first (paragraph 556) provides that "minerals, crude or, not advanced in value or condition by refining or grinding, or by other process of manufacture" are not dutiable. The second (section 3) imposes a ten per centum ad valorem duty on the importation of all unenumerated raw or unmanufactured articles. Hence if natural gas is included in the former class it is not dutiable, if in the latter, it is subject to an ad valorem tax of ten per centum. There has been a decision upon this point by the Board of Appraisers in New York in which it was held that natural gas was included in the operation of the former paragraph. This seems to be the more sensible conclusion, but the result is the same as if there were no tariff law. There is no doubt as to the power of Congress to impose a duty upon the importation of natural gas, the only question is whether it can be taxed under the present laws.

The laying of the pipe across the Detroit river gives rise to another point which has been satisfactorily settled but about which there was at one time considerable discussion. It is this, is either the United States or the Canadian government entitled to duty on the part of the pipe laying in its waters if the material were furnished from the other country? This same question came up for decision in the case of the Port Huron tunnel.

Material entering into its construction throughout its entire length was furnished from Canada, and it was held that in works of an international character there should be no duty upon any of the material even though technically it might be said to be imported.

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IS THE PAROL OR WRITTEN AGREEMENT OF A MORTGAGOR TO PAY THE TAXES ON THE MORTAGEE'S INTEREST VALID AND ENFORCEABLE?—This is a question which is receiving a good deal of attention of late but upon which there are as yet very few authorities. In the December number of the *Yale Law Journal* there is a short discussion of two California cases upon that question, but as there is no usury law in that State and as they merely construe section 5 of article 13 of the California Constitution, which provides that every contract which obliges a debtor to pay any tax upon money loaned shall, in that respect, and as to any interest specified therein be void, they are not authoritative or of much value outside of that State. However, in the absence of other decisions upon the point they are of considerable interest.

In the case of *Burbridge v. Lemmert, 32 Pac. Rep. 310*, a separate written agreement, contemporaneous with the mortgage, was given by the mortgagor by which he was to pay the mortgagee's mortgage interest in addition to the interest reserved in the note and mortgage. On these facts the court held that the agreement was in controvention to the section of the Constitution above mentioned, and rendered null and void all provisions for the payment of interest.

In the recent case of *Dow v. Niles et al., 37 Pac. Rep. 876*, there was a contemporaneous *parol* promise by the mortgagor to pay the mortgage tax, and the same Court held that this agreement did not invalidate the stipulations for interest. It will be seen that in both these cases it was held that the mortgagor could not be compelled to pay the tax, and that in the former case he was not even obliged to pay interest on the mortgage indebtedness.

Apparently the only other decision on this point is in the case of *Banks v. McClellan, 24 Md., 62*, decided on February 28th, 1866. It was there held that "an agreement by the mortgagor to pay the taxes on the mortgage debt is not usurious" even though the interest allowed by law is exceeded thereby. The court in the opinion merely says "we consider that the charges for taxes on the mortgage, with simple interest on each item from the time it was paid, are allowable, Mr. McClellan (the mortgagor) having agreed to pay them, and the law authorizing such payments without incurring usury." No authorities are quoted or referred to by the court, and the cases cited by the counsel are not to the point. Hence this, like the California cases, is of very iittle assistance in solving the question.

From this brief review of the decisions it is apparent that the matter is still undecided, and the subject of more or less conjecture. Still in almost every State the question resolves itself down to this—whether or not such agreements are usurious. If this be so we venture to say that the true rule is this: If the interest reserved in the note and mortgage, and the tax on the mortgagee's interest do not together exceed the rate of interest allowed by law, then the agreement to pay the taxes is valid and enforcible, otherwise that it is not.

Inasmuch as almost all mortgages executed in this State contain agreements of this nature, this question may become of considerable importance.

THE CHIEF PROVISIONS OF THE INCOME TAX LAW.—Probably no measure passed by the Fifty-third Congress has excited more discussion and criticism than the Income Tax. Now that it is a reality, and that the necessary appropriation to enforce it has passed the House and will most likely pass the Senate by a small majority, its provisions deserve consideration.

The tax commences with this year and is to continue for the next five years. It is levied upon the income of the preceding year and must be paid by the first of every July. All "gains, profits or income derived from any kind of property, rents, interests, dividends or salaries, and from any profession, trade, employment or vocation" are subject to the tax.

The tax applies to the income of all citizens of the United States, resident or non-resident, to all persons residing within the United States, and to aliens deriving income from property in the United States. The rate is two per cent on the excess over $4,000, and the penalty for delay in payment is five per cent on the amount of taxes unpaid with interest at the rate of one per cent per month. The method of collecting delinquent taxes is the same as the collection of other taxes under the United States internal revenue laws.

In estimating income the following are to be included: Interest on all securities except federal bonds; profits from the sale of real estate purchased within two years previous to the sale; the amount of sales of vegetable or animal products, the costs of production and the amount consumed directly by the family being excluded; all salaries of United States officials, including Senators and Representatives in Congress and all others engaged in the civil, military, or other service of the government, the government itself withholding the amount of the tax. Moreover the tax includes what is not generally known—a tax on "all personal property acquired by gift or inheritance" during the year. Thus an inheritance tax, if the term inheritance can be applied to personal property, is incorporated into the Income Tax. In this way not only is the inheritance itself taxed, but also the income upon it—a good sample of double taxation.

Besides the income of individuals the law taxes that of all resident or non-resident corporations or associations. Partnerships, religious, charitable, and educational associations, building and loan and mutual insurance companies and other kindred organizations being exempted.

The first thing that strikes the attention is that the tax is really an income tax, that is, an assessment upon *net* receipts and profits. For in computing incomes the necessary expenses incurred in carrying on any business, occupation or profession is to be deducted; likewise all losses actually sustained during the year, all interest due within and paid during the year, and all dividends paid by corporations which have paid the tax upon their net profits. These exemptions apply as well to carporations as to individuals.

In case of dissatisfaction with the decision of a deputy collector, an appeal lies to the district collector; if still dissatisfied the appellant may submit the case with all the papers to the commissioner of internal revenue whose decision is final. Absolute secrecy is enjoined upon all engaged in the collection of the tax and severe penalties are imposed upon those who in any way divulge any particulars contained in any return.

These, in a few words, are the chief provisions of this act, the validity of which will soon be tested in the courts.

## RECENT SUPREME COURT DECISIONS.

"ACCOUNTS" CONSTRUED.—The word "account" has not an inflexible technical meaning but will be construed by looking to the intention of the parties and the sense in which they used it. *Preston National Bank of Detroit* v. *Geo. T. Smith Co. et al.* (Nov. 20.)

ACTION OF MARRIED WOMAN BY NEXT FRIEND—CHARGE TO JURY.—In an action brought by a married woman, a minor, by her husband as next friend, it is error to admit testimony, or to permit a recovery, for the impairment of the plaintiff's ability to earn money; the husband being *prima facie* entitled to the wife's earnings. Where the testimony showed that the plaintiff, as a result of the injury, suffered a miscarriage, a charge to the jury that the loss of the society, enjoyment and prospective services of the child is an element of damages, is erroneous. *Tunnecliffe* v. *Street Railway Company.* (Dec. 7.)

CONTRACTS.—After entering a plea admitting a contract of hiring, defendant is barred from denying the authority of its officer to make such contract. *Derry* v. *Board of Education.* (Dec. 7.)

CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—LIABILITY OF DIRECTORS.—Plaintiff seeks a personal judgment against defendant one of the directors of a corporation which had failed to file an annual report as required under Sec. 12, act 232 of laws of 1885. Appeal was taken from the action of the trial judge in taking from the jury the consideration of undisputed testimony which showed that defendant, a director of a corporation, which had failed to file an annual report, had no purpose in keeping back the report; was not aware of the requirement that such report should be filed; and that when it was due he had not in mind the fact that he was a director of such corporation. *Held*, that the failure of a corporation to file an annual report as required by the said sections is presumptive of an intentional and willful violation, but such presumptions may be overcome by evidence showing no such intentional and willful violation. *Gennert* v. *Ives.* (Dec. 7.)

DEED—DELIVERY.—A deed obtained from a locked box kept in the possession of the grantor when the latter is incompetent to deliver the same, it not delivered. The burden of proof is on the grantee to show delivery of a deed. *Jourdan* v. *Patterson et al.* (Dec. 7.)

DECREE—SATISFACTION.—A decree requiring the payment of a certain sum to complainant or his solicitor is not satisfied by an unauthorized payment to the register of the court. The complainant is not bound by such act and may entirely ignore it. *Lewis* v. *Kean et al.* (Dec. 7.)

EVIDENCE.—Judgment will not be reversed because of the admission of evidence which, while it might properly have been ruled out as incompetent was not of such a character as to prejudice the jury against the party objecting to its admission. Immaterial or irrelevant testimony must be of such a character as naturally to prejudice the jury against the party objecting to its admission. *McKinner* v. *Gates.* (Dec. 7.)

EXEMPTIONS.—A piano cannot be classed as household goods, furniture or utensils, within the meaning of the statute and is not exempt under subdivision seven How. Stat., Sec. 7686. *Kehl* v. *Dunn.* (Dec. 7.)

FIRE INSURANCE POLICY—APPRAISERS.—A provision in a fire insurance policy provided for the selection by the company and insured of two appraisers who in turn should appoint an umpire, such umpire to be a person known to both parties. Where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable and virtually amounts to a refusal to proceed with the appraisement, the fact that it was not concluded before suit was brought will not bar an action on the policy. *Brock* v. *Insurance Co.* (Dec. 7.)

PROMISSORY NOTE—RELEASE OF SURETY.—In an action against an accommodation indorser where testimony showed that the means to pay the note were in the hands of an individual of the firm and not under the control of the firm itself, it was *held*, that the promise of release from liability relied upon was an individual one and cannot be construed to be the promise of the partnership. *Webber* v. *Alderman.* (Dec. 7.)

PROMISSORY NOTE—PAROL EVIDENCE—MEASURE OF DAMAGES IN REPLEVIN.—Plaintiff retained the title to a team of horses until the balance due on purchase price was paid by defendant. A promissory note had been received by him but he claimed, and the evidence sustained him, that this was a memorandum of amount due, and was received as payment. *Held*, that it was competent to show on the trial that the note was not received in payment and that title should remain in plaintiff until full purchase price was paid.

2. Parol evidence is not admissable to change the terms of the payment of a promissory note. Not being tainted with fraud on the part of defendant the giving and taking were deliberate acts of the parties with full knowledge of the contents of the instrument.

3. It is error to admit evidence of damage sustained by defendant between the time of the seizure under the writ and the trial. The proper measure of damages was the value of the use of the team during the time defendant was deprived of it. *Hutchinson* v. *Hutchinson.* (Dec. 7.)

RES ADJUDICATA BINDS ONLY PARTIES TO THE SUIT.—In an action brought to test the title to certain property, defendant claimed to show on the trial that the title to some of the property was adjudicated in a former case, and claimed that such judgment was res adjudicata. *Held*, the contention cannot prevail because plaintiff in this case was not a party to the former one and had before that adjudication brought this independent action to have his right to the property herein settled. *Damm* v. *Mason.* (Dec. 7.)

SUIT FOR VALUE OF MORTGAGED PROPERTY.—Under a security clause of a chattel mortgage possession was taken of certain property and it was offered for sale. Plaintiff tendered part of the sum due on the mortgage in cash and claimed set-off for the balance for loss of a sail boat through the negligence of the defendant. On refusal to accept the tender, plaintiff sues to recover value of the mortgaged premises and the value of said boat. The testimony showed that at the time of the loss of the boat plaintiff himself was present and gave directions what to do. *Held*, that it was error to permit a recovery for such loss. Where an assignment of errors covers several pages of the record some of which contain statements by the Court in which the law is correctly stated, such assignment will not be considered. *Wanner* v. *Mears.* (Dec. 7.)

TREBLE DAMAGES.—In an action brought under Sec. 8306, How. Stat., recovery may be had for treble damages, notwithstanding the defendant acted in good faith in retaining possession of the premises after notice to quit. *Lane* v. *Buhl.* (Dec. 8.)

WILL.—It is error in contesting the validity of a will to admit evidence that one who was requested to draw the will refused on the ground that deceased was at that time insane. It is clearly hearsay evidence. *In re Est. of Julius Lefevre.* (Dec. 7.)

WILL—WASTE.—Plaintiff's husband died testate leaving certain lands to his nephews, but with a right in his widow to fire wood cut from five acres of the lands left to the nephews and the control of the whole of them during their minority. She claims this imports a tenancy without impeachment for waste. *Held*, the provision giving to plaintiff the right to firewood is inconsistent with an intention to give the plaintiff greater power or privileges respecting the five acres. The right to cut firewood cannot be extended to the use of the more valuable timber for other purposes and does not include the right to cut such timber into lumber and with the proceeds buy fuel so long at least as there is an abundance of fuel timber. The cutting of valuable timber was clearly waste. The injury was one done to the inheritance. *Hogan* v. *Hogan et al.* (Dec. 7.)

WILLS—RESTRICTION ON ALIENATION.—Deceased left a will devising to each of her four children a one-fifth interest in her estate. The remaining one-fifth was divised to the child or children of her daughter. The will provided that none of the real estate should be sold or divided before the youngest child attained the age of 21 years; also, that should the daughter die leaving no children, their share should be given to the first mentioned children. The daughter died leaving one child. *Held*, that the period of distribution is not fixed by the paragraph of the will providing for the distribution of one-fifth upon the death of the daughter and failure of issue and that the time when such one-fifth share is to rest absolutely in fee in the children of said daughter is not dependent upon the younger child reaching the age of 21 years, but upon the death of the daughter. The provision of the will that none of the real estate is to be sold or divided until the youngest child reached the age of 21 years is absolutely void as to the four-fifths vested in the first named children in fee, because of the restriction on the right to convey. *In re Est. of Catherine Schilling, deceased.* (Dec. 7.)

WILLS.—A bill was filed by one of the legatees of an estate against the executors asking for the construction of a will and asserting that as a whole it was invalid. The will gave to the widow from the estate an annuity and the use of the homestead, and further directed the executors to pay the taxes and repairs of the homestead from the estate. The estate was then to be divided but *with a restraint on the alienation of each particular share during the lives of the legatee and one other (the wife of the legatee)*. *Held*, that the charges against the estate for the taxes, repairs and the annuity made a restraint on alienations for the life of the widow and this together with the restraint on the alienation of the particular shares made a restraint on alienation for more than two lives and the will was consequently void in these particulars.

2. The will is not void in toto. A provision charging sums advanced during lifetime of deceased against shares of legatees is good.

3. The fact that the widow chooses to take under the statute does not change the construction of the will. She cannot by her election make a will legal which, without such election, is illegal. *Dean* v. *Mumford, et al.* (Dec. 7.)

## LAW SCHOOL NOTES.

Prof. Levi T. Griffin lectured during the entire week of Nov. 19. He will be absent from the school until the close of the present session of Congress.

The membership of the department on the first of December was 603, as against 597 enrolled last year. This number does not include those who, while registered in the literary department, are pursuing studies under the law faculty.

The department is honored with the presence as students therein of two ladies, Miss Agnes F. Watson, of Allegheny, Pa., and Miss Octavia W. Bates, of Detroit. Miss Watson is a senior, Miss Bates a member of the junior class.

Judge William G. Ewing, of Chicago, has been selected to deliver the annual address before tne law classes on Washington's birthday. Judge Ewing established a brilliant reputation in Ann Arbor by his address before the Oratorical Association here last year.

Paige's Cases on Partnership will be used in connection with Prof. Mechem's lectures on that subject this year. Andrew's new edition of Stephen's Pleading has been chosen by Prof. Griffin for the text-book work in that subject. In the absence of Prof. Griffin, the recitations in pleading will be conducted by Instructor Dwyer.

Professor Harry B. Hutchins, of Cornell, who was recently chosen dean of the law school here, visited Ann Arbor a few days in November. He inquired carefully into the condition of the department and the methods in vogue, and expressed himself well pleased with the outlook. He returned again during the Christmas holidays, and will probably assume the duties of his new position at the opening of the college year next October.

On November 17th, Judge Thomas M. Cooley addressed the graduate students and members of the faculty at his residence on State street, on "Compulsory Arbitration." Judge Cooley, although in the full possession of the intellectual power which has so often made itself felt during his long career; is physically in a feeble condition and seldom leaves the house. He remained seated during his address.

It was demonstrated last month that the new rule providing for the examination of note books by the faculty to ascertain whether the stu-

dents are taking proper minutes of the lectures, was no dead letter, but on the contrary full of life. Professors Griffin and Mechem have both called in the books of the entire class in each of their subjects, and given them a careful examination. The faculty insist that each student shall take full notes of each lecture, and his standing in any subject is lowered if the rule is not strictly complied with.

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Prof. Bradley M. Thompson gave an interesting lecture in the Inland League course on the evening of December 3d on "Trial by Ordeal and by Battle." Prof. Thompson is extremely well informed on matters relating to the early history of English law, and treated his subject in a masterly maner. He said:

"Men must be judged by the age in which they live. The age in which trial by ordeal and battle was in vogue was one of superstition. These means of trial were resorted to in order to discover truth. The principal ordeals were by fire and by hot or cold water. The criminal had to give bail after his arrest just as he does now. There were no witnesses; the matter of guilt or innocence was left entirely to Providence. There was a good deal of religious ceremony mixed with the trial. For three days before the trial the prisoner must take the Eucharist. The accused had often to thrust his hand up to the wrist into the boiling water, and then it was tied up in a cloth, and if in three days the hand was not blistered, the man was innocent, while if it was blistered, he was guilty. In the iron ordeal, the prisoner was made to carry a piece of red-hot iron for a distance of nine feet. Then the hand was tied up as in the case of the hot water ordeal, and at the end of three days the blister would decide his fate. Another sort of ideal was that of taking a piece of cheese and making the accused swallow it. If it went down all right, he was innocent; if not, he was guilty and was strangled to death. The ordeal was abolished in the thirteenth century.

"Trial by battle was introduced into England by William the Conqueror in 1066. Curious as it may seem, trial by battle remained a part of English jurisprudence until the year 1819. The last case of the statute being put into use was in the year 1817. There was always a complete legal form to be observed in the trial by battle. Before the fight began there was the exchange of gloves. Then the ring was staked out and the accused and accuser went at it to fight it out. If the accused was defeated he was adjudged guilty and was hanged on the spot, while a victory for him meant his vindication from the charge."

# BOOK REVIEWS.

AMERICAN CASES ON CONTRACT—Arranged in accordance with the analysis of Anson on Contract, and edited by ERNEST W. HUFFCUT, Cornell University School of Law, and EDWIN H. WOODRUFF, Leland Sandford Junior University, New York: Banks & Brothers. One vol., 8 vo. 750 pp. $6.00 net.

This work is primarily intended for students, to be used in connection with Anson or Lawson on Contracts. The authors have followed the classification adopted in the former treatise which insures that which is so necessary to a text-book—a proper division and analysis of the subject. The book contains nothing but American cases which we think is an advantage, for not only are they of greater authority but they also better illustrate the character and procedure of our Courts than any others.

The cases have been well selected and will be found upon examination to exemplify the principles which they are supposed to illustrate. The selection of apt and suitable cases is one of the chief tasks of the case-text-book writer and one in which the present authors have been most successful. The book is divided into five parts. The introduction, by means of a Pennsylvania case, contains a very good exposition of the general nature and classification of Contracts. After which the Formation of Contract, the Operation of Contract, the Interpretation of Contract, and the Discharge of Contract are treated very satisfactorily. The volume contains a very complete index which should render it useful as a book of reference.

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AMERICAN PROBATE LAW AND PRACTICE—A complete and practical treatise, expository of Probate Law and Practice as it obtains to-day, including a discussion of the general principles governing the execution and proof of wills, the devolution of property, the administration of estates, and the relations subsisting between guardian and ward. By FRANK S. RICE, Counselor at Law, and author of "Rice on Civil and Criminal Evidence." Albany, N. Y.: Matthew Bender. One vol., 8 vo., 800 pp. $6.50.

This is an attempt to condense into the space of a single volume a complete exposition of American Probate Law and Practice. At first sight it would seem impossible to accomplish this, but upon an examination of the book we feel safe in saying that the attempt has been successful. It may be questioned whether there is a demand for a work of this nature as the field has already been partly covered by works devoted to particular States. However, as there are a number of States that have no treatise on probate law, and as many of those that have are comparatively obsolete, this seems to be ill-founded. Moreover, in the words of the author, "there is an accumulation of valuable judicial utterances contained in the reports of every State, that would prove of great significance to practitioners of sister States, could they be brought to their attention."

While it is undoubtedly true that probate law is in great measure the creature of statute, the general principles are the same and the practice by no means as dissimilar in the various States as might be supposed. Whatever differences there are exist principally in minor and unimportant details about which disputes are not likely to arise. Wherever there are any marked variances, the author has taken pains to point out and explain

them; but the general uniformity and harmony of the decisions and statutes throughout the country have made this almost entirely unnecessary, and is a most pleasing indication that probate law has finally become crystallized into a system. The most noticeable features of this work are its completeness and comparative brevity, the two most requisite qualities of a law book. The subject is treated in twenty-four chapters, which are subdivided into nearly four hundred sections, the whole being contained in a little over eight hundred pages.

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BRADEN ON ATTACHMENT OF PROPERTY—A treatise on Practice in Attachment of Property for the State of New York, with complete forms by GEORGE W. BRADEN, of the Oswego County Bar. Albany, N. Y.: Matthew Bender. One vol., 8 vo., 346 pp. $3.50.

Although this work is written especially for use in the State of New York it will be found of great assistance to practitioners of those States in which the attachment laws are similar to those of New York. The work is a very good exposition of the laws in attachment in New York State as prescribed by the legislature and interpreted by the decisions of that State, including the decisions rendered up to November 1st, 1894. Though the volume is small and the text brief, the subject has not suffered any as it is ably handled, the points of law being all sustained not only by New York authorities but also by those of other States. The work contains 315 pages of text, an appendix of forms covering 64 pages, a complete index, and a table of the cases and the sections of the code cited. The subject itself is divided into three parts, giving the practice in the Supreme Court, the New York City Court and the inferior Courts. The first four chapters treat in general of the nature of attachments, when obtainable, the proof necessary, and against whom it may be enforced. Chapter five describes the bond or undertaking and the warrant in detail; in chapters six and seven the proceedings under the warrant are carefully and systematically gone over. Chapter nine enumerates the different classes of property exempt from attachment. The next four chapters treat of the proceedings after the levy, the proceedings to remove the lien and vacating the same, and of judgment, execution and its effects. The appendix of forms which follows is very complete and commends itself to the busy practitioner.

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CLARK ON CONTRACTS—Hand-book of the Law of Contracts by WILLIAM L. CLARK, JR., author of Clark's Hand-book of Criminal Law. St. Paul: West Publishing Co. One vol., 8 vo., 923 pp. $3.75.

Although not especially so labeled this book is one of the series of elementary treatises which the popular and energetic publishers have seen fit to call "The Hornbook Series." We have had occasion to say something of previous volumes of the "series." The last volume previously issued, Shipman's Common Law Pleading, seems to have met with special favor. But for general uses to all classes in the profession this work will no doubt prove to excel all its predecessors. It is considerably larger than any of them, containing 786 pages of text, with a well constructed and comprehensive index of thirty-five pages and just one hundred pages devoted to the table of cases. The mechanical and typographical arrangement is arranged with the same degree of excellence that has characterized

all the volumes of the series. The paragraph headings and the black-letter sentences serve to enable the reader to comprehend and retain the fundamental principles of the subject. These general principles have been stated with clearness and as concisely as possible in the treatment of a subject comprising so much. In thus confining himself to the essentials the author has shown rare good judgment.

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GARDNER'S REVIEW IN LAW AND EQUITY.—A Review in Law and Equity for Law Students together with a Summary of the Rules Regulating Admission to Practice throughout the United States. A Hand-Book for Law Students by GEORGE E. GARDNER, of the Massachusetts Bar. New York: Baker, Voorhis & Company. One vol., medium size 8 vo. 316 pp. $2.75.

As would naturally be supposed, this book is one designed especially for students, and particularly those making their final preparations for admission to the bar. Strange as it may seem, this small volume covers in quite a comprehensive manner the whole field of law and equity. A mastery of it will possess the student of almost all the requirements for admission to the bar. It is beyond question the best work of the kind we have ever seen. In no other is the whole field so thoroughly covered. In no other can there be found such a perfect combination of clearness and brevity. The summary of the rules regulating admission to practice throughout the United States is a valuable feature. It is the only compilation of the kind, we believe, in existence. It would not, of course, be advisable for a student to begin his studies with this book; but having pursued his studies for a sufficient period, a thorough study of this work, and a mastery of its contents, will fix in his mind the necessary fundamental principles, and make him exceedingly well equipped.

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GENERAL DIGEST of the Decisions of the Principal Courts of the United States, England and Canada. Refers to all reports, official and unofficial, first published during the year ending September, 1894, including the L. R. A., the I. S. Com. and the United States Supreme Court Reports, L. Ed. annual, being volume IX of the series. Prepared and published by the Lawyer's Co-operative Publishing Company, Rochester, N. Y. 1894. $6.00.

Under our system of law in which precedents are so much respected, a digest such as the General Digest is almost a necessity. In other countries where such respect is not paid to decisions the lack of works of this nature is very noticeable to the American lawyer.

In general form and arrangement this year's digest is very much like its predecessors, except that it is more complete and exhaustive. The magnitude of this work can only be realized when it is known that the table of cases digested covers 212 closely printed pages and that the table of cases criticised, overruled, distinguished, etc., takes up 83 pages more.

Besides the decisions of the American courts the Digest contains the reports of the principal cases decided in England and Canada, and thus includes some very valuable decisions.

The compilers have successfully accomplished "the double purpose of every good Digest: First, to constitute an infallible guide to every decision upon any question to be examined, and second, to state accurately the law of that decision."

## CURRENT LITERATURE.

The *American Magazine of Civics* under its new title presents a very valuable January number. With eleven long articles it contains too much matter for review. The most interesting articles are "An Argument for the Single Tax," by Isaac Feinberg; "Some of the dangers of Free Coinage," by Arthur B. Dale; "The Church and the Labor Question," by Prof. Henry H. Barber, D. D.; and "The Probable Benefits and Dangers of the Recent Election," an expression of the opinions of Hon. John Wanamaker, Chas. A. Brinley, James M. Beck, Esq., Hon. Wm. B. Allison, Hon. Wm. J. Bryan. (New York: Andrew J. Palm & Co. 25 cents. One year, $3.00.)

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In the January *Review of Reviews* Mr. Robert McDonald, an English journalist, presents a pen picture of John Burns, the English labor leader now visiting this country. In the editorial department are discussed problems in public health administration, municipal reform, demands for bank note currency, and many other questions of timely interest. (New York: Review of Reviews. Monthly, 25 cents. $2.50 a year.)

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*Public Opinion* begins the new year with the best of prospects. The present year promises to be an eventful one, and this hustling little publication may be depended on to focus the light of the many events to come within a spot that may be seen by all. Its excerpts are evidently made with great care and discrimination, and its editorial summaries are models of terse statements. (Washington and New York: Public Opinion Co. 25 cents. $2.50 per year.)

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In the January *Popular Science Monthly* the late Col. A. B. Ellis gives some interesting historical facts about the Sabbath and its origin and the manner of dividing months into weeks of different number of days by various peoples. An article of especial interest to those interested in evolution is "Babies and Monkeys," by S. S. Buckman. (New York: D. Appleton & Co. 50 cents. $5.00 per year.)

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Lawyers and all other persons who take a live interest in public affaits will be deeply interested in the article by John H. Denison in the January *Atlantic* entitled, "The Survival of the American Type." In a fearless manner he reviews the political situation, more particularly in the larger cities. This number also contains the first chapters of "A Singular Life," a new serial by Elizabeth Stuart Phelps. (Boston: Houghton, Mifflin & Co. 35 cents. $4.00 per year."

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With the issue of January 7, *Littell's Living Age* will begin its 204th volume. In the prospectus valuable and timely articles in science, politics, biography, theology and general literature, from the pens of some of the best English writers, as well as the choicest short stories by the best authors, are promised. New subscribers are offered the thirteen weekly issues of the last quarter of 1894, gratis. (Boston: Littell & Co. Weekly 18 cents. $8.00 per year.)

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With the January number of the *North American Review* begins the eightieth year of its existence. It is opened by a very readable article by Albert D. Vandam, in "The Influence of the Napoleonic Legend," which is the first part of an interesting bit of French history by that writer. Mark Twain contributes an article, and the Director of the Mint discusses "The Future of Gold." Another of the leading features is the article by Ex-Speaker Reed, "Historical Political Upheavals." (New York: North American Review. 50 cents. $5.00 per year.)

# MICHIGAN LAW JOURNAL.

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## *THE MISSION OF STATE BAR ASSOCIATIONS.*

RALPH STONE.

Mr. President, and Gentlemen:

It would seem at first thought, if you will pardon the use of a time-worn phrase, "Like carrying coals to Newcastle," to bring to the New York State Bar Association anyone's conception of the proper mission of State Bar Associations. Your association stands easily at the head of such organizations, in the character of its membership, and its service to the law, and in its utility to the profession. I have no apology to make as a young man, and perforce of somewhat limited experience in the practice of the law, for undertaking to discuss this broad question, in the presence, constructively at least, of the cream of the lawyers of this powerful commonwealth, and I have no apology to make simply because I intend neither to trespass upon the domain of those learned in the science of the law itself, nor to make any statement that as coming from a young man may savor of presumption. I would rather speak as a non-professional, and at times as though living in the atmosphere and looking through the glasses of the client.

Your Association, more often than any other in the country, has listened to addresses of the same character as this. In 1880, Samuel Hand addressed you upon "Bar Association and The Profession." Elliott F. Shepard in 1885 spoke upon "The Duty of the Profession to Bar Associations." In 1888, Martin W. Cook read a paper upon "Bar Associations, What they may Undertake." I regret that in the preparation of this paper I have not had the opportunity to consult these addresses carefully, in order to ascertain how the subject has been heretofore presented to you, It has been treated to some extent in other States, notably by Melville W. Fuller before the Illinois State Bar Association, by William L. Gross, the earnest Secretary of that Association, and by Walter B. Hill, President of the Georgia State Bar

Association. The opportunities of Bar Associations as agencies for the promotion of all movements having for their object the improvement of the law and the profession, have also been touched upon and dwelt upon at length by the presidents of the various Associations in their annual addresses. It is a fair criticism upon all of these utterances, however, that they consist chiefly in "glittering generalities," or are beautifully constructed ideals of what bar associations ought to be. The field of practical suggestion has rarely been trodden, and it is the purpose of this paper to tread upon that field in a modest sort of a way, and stimulate if possible, a little interest in the practical work of bar associations.

Lawyers are busy men, and those whose ability and influence are most needed in furthering such work, are the most occupied with their business, and the least inclined to render assistance. They are in hearty sympathy, perhaps, with the various projects for reform in the law and its administration, but, with nothing more than their naked countenance of such reforms, their membership is productive of no benefit to themselves or the profession, unless it is that the mere fact of their names being upon the rolls is a silent inducement to others to ally themselves with such associations. Occasionally one of the more capable members of the profession finds time, with the assistance of a stenographer, to prepare an address to be delivered before a gathering of lawyers, drawing from a rich vocabulary for sonorous phrases, and symmetrically rounded rhetorical periods, and from a well stored mind for quotations from the writings of noted and revered jurists of olden times, topping off the literary structure perhaps with several paragraphs of beautiful and inspiring sentiment.

It is hardly necessary to enlarge, in this general way, upon the inert condition of state bar associations. It is a fact so notorious, that its truth is conceded. Some suggestions that may, perhaps, be dignified by the description of remedial measures, will be considered later.

If not especially instructive, it is at least interesting to know some thing about the various state bar associations of the country, and their relative activity. There are 29 of these associations: Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. It may be noted in passing, although not relevent to this part of the discussion, that in fifteen of these twenty-nine States, a code in some form has been adopted.

Without intending to make any invidious distinction, I would place the first six associations in point of activity and usefulness as follows: New York, Illinois, Ohio, Missouri, Alabama and Oregon.

The Alabama Association was at one time very active, and is still quite influential in the State. It has a membership of about 200. A recent meeting of the Association was held at a lake resort, and in lieu of the conventional banquet, a barbacue dinner was served. The Association was organized in 1878. It has secured the enactment by the Legislature of several important measures, although in the majority of instances the Legislature has not looked kindly upon the Association, and frequently measures suggested by the association have been vigorously opposed and defeated by demagogues in the Legislature, who were lawyers, but not members of the association. The association is invested with the power to institute proceedings against attorneys. Some years ago, a prominent attorney was prosecuted by the Alabama organization, and although he escaped conviction, upon a technicality, the proceeding have had a healthy deterrent effect.

The Arkansas association is dead. It was organized in 1882 and died in 1890 with a membership of 76.

The California association is not very active. The President died about two years ago, and the officials, I am informed, are too busy to call it together and reorganize it.

The State Bar Association of Connecticut has amply justified its existence by procuring the enactment of the "Practice Act," if for no other reason. It has also been useful in securing the passage of beneficial laws of minor importance, and in raising the standard of the profession. The meetings, however, are not well attended. The association was organized in 1875, and has a total membership of 125, probably two-thirds of the active lawyers of the State, according to the secretary.

The District of Columbia Association is quite active, and has a membership of 175. The annual meetings are not well attended, but the interest has centered in the special meetings, when action looking to the formation of a Court of Appeals in the District has been under consideration. The Association itself has no distinctive social gathering, but there is an annual "shad-bake," so-called, an excursion down the Potomac, open to all of the bar of the district, and usually attended by the Justices of the Supreme Court and the Court of Claims. It is a very popular affair. The association has accumulated a library, the maintenance of which is the principal object of its existence. It was organized in 1874.

The Florida association is practically extinct, passing out of existence about four years ago. It printed no reports of its pro ceedings.

The Georgia association is one of the few active ones. It was organized in 1884, and has a membership of about 250, about 100 of these attending each annual meeting. The cities in which the meetings are held, usually tender the association a banquet, fish dinner, boat ride or reception. The most valuable reforms accomplished by this association have been, simplifications and modifications of the civil procedure, and just recently the Legislature passed a bill providing for the appointment of a commission of first-class lawyers in each judicial district to examine applicants for admission to the bar, the method of examination by committees in open court being abrogated. The latter reform is on the line of a paper read at one of the recent meetings of the Georgia Association.

The Illinois association, next to New York is the most active and influential in the country, It was organized in 1876 and has 350 paying members. Their meetings always close with a banquet "with the ladies and without wine," says the Secretary. The Illinois system of intermediate courts of appeals is the direct result of the influence of the association, and the present agitation of the Torrens system of land titles was inaugurated by it. Some amendments to the criminal law of Illinois are also due to the influence of the association, notably an increase of penalty for crime on second and third convictions. The Illinois association takes an especial pride in the addresses and papers read before it, which have been of an exceptionally brilliant character.

The Kentucky association has few members living outside of the Capital, Frankfort, and is not active.

The Louisiania association has not met for nearly seven years, and is practically defunct. It has never published reports of its proceedings.

The Maine association re-organized in 1891, is fairly active, and has a membership of about 280. With the exception of one or two matters regulating practice, no legislation has as yet resulted from its influence.

The Minnesota association was formed in 1886, but has been inactive for the past three years. Its committees for the first two years, attempted to exercise influence over legislation, but did not succeed in competing with the "third house," and gave it up. Some of its recommendations were acted upon, particularly a system of State examination for admission to the bar, which is a vast improvement over

the old.

The Association in my own State, Michigan, was organized in 1890 and has about 350 members. It has been working during the three years of its active existence, to secure the passage of a bill regulating admission to the bar, and providing for a standing commission to examine applicants. It was instrumental in relieving the congestion of business before the State Supreme Court, by bringing about the appointment of two additional justices, increasing their salary, and compelling them to reside at the State Capital, Lansing. The association was reorganized last year, and has under way needed reforms. I regret that I cannot submit a better report than this from my own State, but we hope that the persistence and earnestness of a few of the leading attorneys of the State will result in a very substantial increase in interest in the work of the Association.

The Missouri association is probably the fourth in strength and influence. It was organized in 1881, is very active, and has a membership of over 300. The annual meeting usually closes with a banquet and sometimes with a ball, which is attended by the wives and daughters of the members. It has had considerable influence in selecting appelate judges, in the enactment of legislation creating appellate courts and a supreme court commission to aid the supreme court, in adding two justices to the supreme court, and in causing the State to be re-districted judicially. It has not only succeeded in raising the standard for admission to the bar by legislative enactment, but has also urged the strict enforcement of the statute by the courts. Altogether, the Missouri association has amply justified its existence.

The Montana association was organised in 1885, has about forty paid members, and the annual meetings average an attendance of ten. It has had no perceptible influence in the State, and its recommendations to the Legislature have been few and feeble. In fact, it is, as its Secretary says, "comatose if not really moribund."

The New Mexico association, organized in 1886, is also small, having but seventy-five members. It is quite active, however, and is able to boast that all of its recommendations have been acted upon by the Legislature. It has a code in preparation, which it fully anticipates will be enacted by the Legislature.

I now come to the New York State Bar Association, and will not promise to tell you that which you already know. I can only repeat, that you are known everywhere throughout the United States as the leading state bar association in the country, in every respect, and that the lawyers of other States look up to you as a pattern

worthy of imitation. The reports of your own officials will give you the statistics of your organization, but in order that this history may be complete, I will add that the association is in its eighteenth year, and has a membership of over 1,000 of the best lawyers in your great State. The secretary of one of the most vigorous bar associations writes me, that "the profession in all the American commonwealths owes a debt of gratitude to the New York State Bar Association, for the stand which it took in open opposition to the elevation to the bench of an unworthy and corrupt man, resulting in his ignominious defeat." Henry B. Brown, Justice of the Supreme Court of the United States, chosen from my own State of Michigan, a teacher loved by all graduates of the University of Michigan Law School, has publicly spoken as follows concerning your association: "The Bar Association of the State of New York, if it had no other title to fame than the stand it has taken with regard to two or three questions of public interest, and with regard to the appointment of two or three men, at different times, would have vindicated its right to existence and established its claim to recognition, and to the admiration of the community, by those very acts."

The Ohio association, organized fourteen years ago, ranks third in activity and usefulness. It has a membership of 450 lawyers, over 200 of whom attend each meeting. Its recommendations to the Legislature are usually acted upon. Its meetings are sometimes held at a lake resort. Through its influence, the only amendment to the State Constitution ever adopted, was secured, the old district court held annually by the judges of the nisi prius courts being superseded by the Circuit courts, a system of intermediate courts. Other reforms accomplished by this association are as follows: Election contests of judicial officers are tried by the courts themselves instead of by the Senate; the salaries of the supreme court judges have been increased, the term of office lengthened, and the number of judges added to, and provision made for two divisions of the court in order to facilitate business; an increase in the time of study for examination for admission to the bar, from two to three years, taking effect July 1st, 1895; various changes in local practice; the creation of non-partisan election machinery; the adoption of an improved method of drawing grand and petit juries; the establishment of a law school at Columbus; and changes in the laws relating to the rights of married women. The association is contending for the abolition of a fee system of paying County officers, and for the substitution of salaries, and is discussing codification.

The Oregon association is quite active, has a membership of about 200, and is four years old. For so young an association, it has done admirable work. It has succeeded in obtaining legislation upon various matters of practice, and is now actively engaged in urging upon the people the creation of a code commission to re-draft the laws of the State. It is endeavoring to increase the number of justices of the State Supreme Court, in order to dispose of the accumulated business before that tribunal. At the last meeting of the association, more than twenty proposed amendments to the existing laws were considered and recommended, and bills are being drafted to present to the next session of the Legislature. Verily the Pacific brethren are absorbing some of the New York spirit.

The South Carolina Association was organized eight years ago, and has a membership of about 250. It is active, but it is difficult to maintain the interest of its members. It has secured the enactment of some laws regulating practice.

The Tennessee association is thirteen years of age, has a membership of about 325, and is very active. It has had no influence over legislation.

The Vermont association, organized in 1877, is one of the strongest, and embraces in its membership almost every lawyer of prominence in the State. It has been aiming, with some success, at uniformity of State laws, and especially in the rules for the county courts. It has also prepared bills to remedy defects in procedure, and will urge their enactment by the Legislature.

The Virginia association, organized in 1888, has a membership of about 470, and is fairly vigorous. Its influence has been chiefly ethical and social. The association has been unsuccessful in securing the passage of laws, although it has been urging a bill for certain reforms in practice and in the requirements for admission to the bar.

The Washington association, organized five years ago, is inactive, has a membership of only eighty, and might with profit absorb some of the spirit and energy of its neighbor in the State of Oregon.

The West Virginia association was organized in 1886, but its direct influence is very slight. It has legislative committees, but they exercise no practical influence upon legislation. Its recommendations when made direct, have been disregarded.

The Wisconsin association has one vigorous member, the secretary. The organization itself evinces no vitality, exeept at its banquets. The hard work of a few, in the name of the association,

has resulted in the appointment of a commission which passes upon all admissions to the bar by means of a strict examination The association was organized in 1878, and has a membership of about 350.

I wish that the limits of this paper would admit of the drawing of general conclusions and comparisons from the histories and experiences of the different State Bar Associations, but I am compelled to abbreviate this part of the discussion in order to dwell more at length upon other and perhaps more important features. I will content myself with one deduction, namely; that almost all of the State organizations have exerted an influence for good in so far as they have brought lawyers together and cultivated in a greater or lesser degree, a brotherhood of the bar, but they have generally speaking, proved an absolute failure in so far as any practical good has been accomplished to the body of the law itself, to its administration, and as a consequence, to the business and social interests of the people for whom laws should primarily be made. This is not a flattering or complimentary statement, perhaps, but I believe it to be an honest one, and it is time it should be made by someone.

Before considering what should be done to utilize the vast amount of intellectual strength and influence that is locked up in these 29 State Bar Associatians, let us take a brief and necessarily hasty glance at the live legal problems of the day, the present status of each, and what the proper mission of State Bar Associations is with respect to them. In other words, what o'clock is it in law reform.

1. And first and foremost, of legal education and admission to the bar. I say "first and foremost" advisedly and deliberately, and with all the emphasis of which my feeble personality is capable. There is no legal problem before the lawyers of this country to-day that should receive more attention than this. On its solution depends the future, first, of American jurisprudence and second, in very great degree, of the social, and business and commercial interests of the people, since lawyers of necessity influence legislation more than any other class. We cannot bear in mind too vividly, on the one hand, that reforms of all kinds, and especially legal reforms because of the traditional conservatism of our profession, come slowly, almost painfully so, and, on the other hand, the fact that the span of human life is narrow. One generation inaugurates a reform, and several succeeding generations develop it, and finally effectuate it.

Jeremy Bentham listened to Blackstone's lectures, and almost

immediately after his graduation from Oxford in 1763, began his attacks upon the antiquities and excrescences of that English law so beautifully eulogized by his teacher. He became a radical advocate of codification, but in spite of his own able efforts, and the hard and conscientious work of his successors, the idea of codification has taken root so tardily, that it has not manifested itself practically until our own day.

How important it is, therefore, that we of to-day go even to what is denominated extremes in prescribing the methods of training and educating those who immediately follow us, so that they may be equipped and qualified to grapple with these all-important problems of law reform.

The powerful press speaks glibly, and with too great a showing of truth, of the cunning and screwd lawyer, and too rarely of the intellectual and skillful advocate. We are forced to face the disagreeable truth that the mass of the people look upon the profession very much as government is regarded by political economists—as a necessary evil. We ourselves, in our eulogistic references to the great jurists and talented leaders of the profession, are too prone to go back to the Eldons, Erskines, Cokes and Blackstones, and to neglect our own Marshalls, Websters, Cooleys and Choates. Does this mean that the profession of the law nowadays is regarded by its own members as below the average of the bar of two or three generations ago? There are too many evidences of it. A depressing picture could be drawn of the condition of the American Bar to day, if we were to accept the public's idea of it. But those having the true interests of the profession at heart, will deny that its character is retrograding or that its intellectual standard is depreciating. In order, however, to place the profession where it belongs in the public estimation, as well as for other reasons, the proper authorities must take up this problem of legal education and admission to the bar, and solve it, and there are no organizations better equipped to undertake the work, than the state bar associations of the country, acting perhaps in co-operation with the American Bar Association.

Next to life itself, the most valuable material thing to man is property. When illness racks his physical frame, or when he has reason to believe, that unless he takes proper precautions his health will be impaired, he consults a doctor of medicine. So too, when his business interests have become seriously involved, or when he wishes to make a a proper and wise disposition of his property, he consults a lawyer. To many, material prosperity is scarcely less important than physical well being, and, indeed there are those, and too many of them, who value

their fortunes more than their health. What a vigorous protest would arise all over this land, if a certificate merely of good moral character should entitle a person to practice the profession of medicine. And yet such a certificate, under the laws of one of our States, qualifies a person to practice law. This is an extreme case, to be sure, but it is cited in order to justify the statement that the requirements for admission to the bar in the several States, are not only in a deplorable state of non-uniformity, but in a very great majority of the States, they are wofully insufficient. There is no more reason in framing laws so that incompetent persons can invest themselves with the office and privileges of an attorney at law, and trifle and tamper with, and damage the property interests, of unsuspecting people, than there is in permitting anyone, without study of or preparation in the science of medicine, to use the surgeons knife or to prescribe for dangerous diseases. The laws regulating admission to the bar in the several States, or in a vast majority of them, need revision, and it should be made the first aim of each State Bar Association in the country, to see that the laws of its own State are brought up to the highest standard. If the New York law, for instance, is the best that can be conceived, it should be adopted in every State in the Union, so that the requirements for admission may be uniform throughout the country, and the term "The American Bar" mean something.

In order to illustrate the diversity of requirements in the several States, I have compiled from correspondence from the attorney generals of all the States, a statement of the present status of the laws regulating admission to the bar. A similar investigation was made in 1881, by a committee of the American Bar Association, but its published report embraced only twenty-three states, and in a number of those, the laws have been changed for the better since that time, owing to the vigorous agitation of the matter by the lawyers. In my correspondence, I have found the attorney generals of the States uniformly courteous and obliging, and many of them have manifested interest enough to furnish not only an extended comment on their laws, but extracts from the statutes of the rules of their courts governing the subject. I cannot embody the full results of this correspondence in this paper, but I have arranged it in such form that it may be preserved for reference if it should prove to be sufficiently valuable. A few general observations, however, may serve to illustrate the importance of giving greater attention to the matter of uniformity of laws for legal education and admission to the bar.

In all of the States, good moral character is required, and its possession by an applicant for admission is proven and certified to by various methods. It is absolutely necessary, of course, that lawyers should possess good moral character, and it is undoubtedly a wise provision to require its proof or certification before the privileges of an attorney at law are bestowed upon an applicant. But this requisite need give us very little concern, inasmuch as nearly all applicants for admission to the bar are young men whose morals have not been tainted. If the State authorities would only devise some method of maintaining the good moral character of members of the bar, their statutes regulating these matters would be vastly more serviceable. Practicing attorneys, who have violated their oaths and who have been guilty of unprofessional conduct, in other words, whose moral character will no longer stand the test which it endured when they were admitted to the bar, are suffered to continue the practice of the law simply because their associates either have not the courage. or for other reasons are not disposed, to inaugurate disbarment proceedings. If the State, by its laws, is so careful to prescribe good moral character for admission to the bar, it is unquestionably its duty to see that this good moral character is maintained, and it should itself provide the machinery for disbarment, and attend to the execution of the laws in this respect as faithfully as it does in other respects.

Twenty-four of the States require a period of study previous to examination for admission, and in all the other States an applicant for admission can take his examination at any time, and the examinations are usually so informal, that practically he can be admitted at any time. Therefore, generally speaking, in about twenty of the States in this country, there are practically no requisites for admission, or they are so loosely observed that their object is frustrated. In a number of the twenty four states, where a period of study is required, the examinations themselves are formal matters, but although this should not be, yet we can in a measure condone it in view of the fact that the applicant is at least required to study a certain number of years before being allowed to take his examination. These States, and the number of years study required in each are as follows: North Carolina, one year; Washington, eighteen months; Colorado, Illinois, Iowa, Kansas, Maine, Maryland, Nebraska, North Dakota, Wisconsin and Wyoming, two years; Connecticut, Delaware, District of Columbia, Minnesota, New Hampshire, Ohio, Pennsylvania and Vermont, three years; New Jersey, three, if the applicant possesses an A. B. or a B. S. degree, and four

years if he does not; New York and Oregon, two years if a college graduate, three years if not; and Rhode Island, two years if the applicant possesses a classical education, three if he does not.

The favorite method of examining applicants is in open court by a temporary committee appointed by the court, or theoretically by the county or supreme judges themselves. Both of these methods, according to the testimony of the attorney generals of the several states, are very unsatisfactory. They are the methods in vogue, however, astonishing as it may seem, in all but eight of the States. There are regularly constituted boards examiners, whose examinations are real tests of competency, in Connecticut, Delaware, District of Columbia, (elected by the Bar Association), Maryland, Massachussets, Minnesota, New Jersey and New York.

Diplomas from State law schools will admit without examination, in fourteen states, viz; Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin.

A standard of general education is necessary in only four states, viz; Delaware, Minnesota, New York, and Pennsylvania. In Delaware, Pennsylvania and Vermont, the student must register before beginning the study of the law.

In the state of Indiana, there are no requisites for admission to the bar, except that the applicant must be a voter of good moral character.

This summary of the laws regulating admission to the bar, and the machinery for executing them in the several states, is a more eloquent plea for uniformity of requisites for admission throughout the Union, than pages and pages of earnest words. There is no reason in the world for a diversity of laws which will permit any voter, provided he be a good man morally, to practice law in one section of the country, while in another section good general education, tested by examination before commencing the study of the law, and a rigorous examination in the law, are required before admission. The mission of State Bar Associations in this regard, is obvious.

II. Bar Associations should be the monitors of State legislation, in so far as it concerns or affects the body of the law for the administration of justice. Specifically and practically expressed, each association should have a committee, whose especial duty it should be to frame the suggestions of the Association into bills, see that they are introduced into the legislature, and work hard for their enactment. The recommendations of a State bar association ought to command the

attention of a legislature, and be almost equivalent to enactment, but the experience of nearly all the State bar associations is, that their propositions are received with suspicion, and rejected without serious examination or consideration. The real reasons for this are; first, that bar associations are generally speaking not representative of the bar of the State, and second, that legislators are educated in the belief that lawyers are natural lobbyists and all of their suggestions should be regarded with suspicion. It would seem therefore, that if the usefulness of such organizations is to be materially increased, each association should add to its membership until it embraces not only the ablest lawyers in the State, but the major portion of them. A recommendation from such an association, through its accredited committee, will as experience in a few of the States has demonstrated, carry weight and produce the desired result. How to allay the suspicion of jobbery which legislatures entertain with respect to measures proposed by lawyers, is a problem which is not so easily solved. Its solution means the entire reconstruction of public opinion, and can be accomplished only by the manifestation of a sincere and earnest desire on the part of lawyers, to improve the laws of the State and to facilitate the administration of justice. It means hard work, and it means sacrifice of the lawyers' time. If the Bar is unwilling to make the necessary sacrifices, in other words, if lawyers continue to neglect their responsibilities as semi-public men and officers of the courts, bar associations are useless organizations, and this paper is waste ammunition.

This committee on legislation, which should be a constituent part of each bar association, should not only frame and urge the passage of bills, but more important still, it should watch legislation, familiarize itself with every measure introduced into the legislature, effecting the law or its administration, and use all the influence and strength with which it is clothed to prevent the enactment of vicious and hurtful laws. Several State associations have such committees, but they have been ineffectual because they have not been constituted of the proper men. Great care should be exercised in their selection, their chairman should be vigorous and enthusiastic in the work, and the committees should be held to strict accountability. In I think, nearly all of the States, a certain period at the beginning of the session of the legislature is allotted for the introduction of bills. Immediately after the termination of that period, in the time when bar associations should convene at the State capitol, and exert their influence in a practical way upon legislation. The judiciary of the State have it in their power to adjourn

the county, appellate and supreme courts on those days, and countenance and strengthen such meetings by their attendance. I am aware that the members of the legislatures are likely to resent such meetings, as attempts to interfere with and reflect upon them, but it is fair and just to them to suppose, and when the sincerity of purpose of these associations is demonstrated, such feelings will die a natural death and the legislatures and lawyers' organizations will work in harmony.

III. A third field in which State bar associations can work, and to the advantage of the people in particular, is in lending their influence to those who have undertaken to unify the laws of the States. I intended to dwell at some length upon this phase of the work of bar associations, but I find that it has been but lately presented to you, and I will simply allude briefly to the progress that has been made by the commissions on uniformity of laws in the several States, and suggest that bar associations should co-operate with these commissions, and facilitate the accomplishment of the reforms fathered by them. It is pleasant to record the facts that this movement for uniform laws was inaugurated in 1889 by the State of New York, and that Michigan was one of the first of the States to follow and appoint a commission. Like all legal reforms, progress in this one has been slow. Twenty-two States have appointed commissions as follows: Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Virginia, Wisconsin and Wyoming. Four conferences of the commissions have been held, the first on August 24th 1892, at Saratoga Springs, N. Y.; the second on November 15th 1892, in New York City; the third in September, 1893, at Milwaukee, Wisconsin; and the fourth at Saratoga Springs in August, 1894. The work of the commisions thus far, embraces the subjects of: Acknowledgment of written instruments, bills and notes, execution of wills, marriage and divorce, weights and measures, discussed at the first meeting; the same subjects and the sealing of deeds, probate of foreign wills, and days of grace and presentment of bills and notes, at the second conference; at the third conference the work of the previous year was approved, and standing committees were appointed on the various subjects already mentioned, and upon commercial law, on descent and distribution of property, on certificates of depositions and forms of notarial certificates, and on appointment of presidential electors; and at the fourth confererence the feasibility of preparing a commercial code was thoroughly discussed.

The practical result of the agitation for uniform State laws, as far as I have been able to ascertain, is the abolition of days of grace on notes in New York and several other States. It is not necessary to dwell upon the immeasurable benefits that must result from uniform laws. Of all legal reforms, it awakens the least opposition, if indeed it is antagonized at all, and it seems singular that, in the five years since the movement was inaugurated by New York, commissions have not been appointed in all of the States in the Union, and laws made uniform throughout the country in nearly all of the subjects taken up by the conferences of the commissioners, with the exception possibly of marriage and divorce. It is but another illustration of the conservatism of of the profession, or what the younger and perhaps more impatient among us would denominate indifference.

IV. There are other legal problems to the solution of which bar associations are turning their forces. The most important of these is codification, and those of growing significance are: the alarming increase of law reports, the proper method of selecting judges, the congestion of business, especially those of last resort, and others of greater and lesser magnitude.

I am aware that this State of New York is the very heart of the codification movement, and that the life blood of the reform pulsates through its arteries and veins to nearly every section of the country. I am not dwelling at length upon it, I wish it understood that I do not underestimate its importance, or undervalue its influence for good upon the body of our jurisprudence. But I feel my inability to contribute anything new to the discussion of this question, and will not consume time in repeating the arguments for and against. It is really the only serious debatable question which bar associations are called upon to consider, and we of the central States, and the profession to the west of us, seem to have endorsed it more enthusiastically and practically than the more staid and conservative brethren east of the Alleghanies. There is not an intelligent lawyer in the land, who does not appreciate the necessity of a restatement and a reconstruction in some degree, of the law and its procedure. Call it a code, and you arouse opposition at once, simply because the word to many, signifies ultra-radicalism. The spirit of codification in some form, pervades the entire American bar, although its practical manifestations are not as frequent as they should be, and it is in this direction that bar associations can perform valuable service. Codification is taking root in twenty-eight States and Territories: New York, Missouri, Wisconsin, California, Kentucky, Ohio, Iowa, Kansas, Nevada, North Dakota, Oregon, Idaho, Montana,

Minnesota, Nebraska, Arizona, Arkansas, North Carolina, South Carolina, Wyoming, Washington, Connecticut, Indiana, Colorado, Georgia, Utah and Maine. There are eighteen codes of criminal procedure, five penal codes, and five general civil codes, altogether an array of fifty-six codes in the United States.

Like the typical sermon of the satirist, this paper will have a number of "lastlies," or in other words, the writer's conclusions concerning the mission of State bar associations. The present status of bar associations may be summed up in two sentences, always admitting however, that there are exceptions. First, as agencies for reform, they have manifested a masterful inactivity, and have not exerted the minutest fraction of the influence of which they are capable upon legislation, and upon the profession itself. Second, and as a consequence of the first State bar associations, conceded that there is a vast amount of dormant energy and influence locked up in their membership, have utterly failed to advance the development of a uniform and improved system of legal education and admission to the bar, have neglected to properly and effectively utilize their organizations as monitors of legislation affecting the law and its practice, have done absolutely nothing to assist in the accomplishment of uniformity of laws, and have not given the serious attention to the great problem of codification and the other less urgent reforms, which their importance demands. These statements are deduced from a correspondence with two secretaries of every existing State bar association, and are not one whit too severe. The whole thing may be summed up in one significent word: "Indifference."

It naturally follows, therefore, that the first thing to be done is to eliminate this indifference. More of what are termed the "best men" in the profession, the leaders at the bar, those with the brains and ability to win their causes by honest and fair means, must take an active interest and participation in the work of bar associations. It is not meant by this that the leading spirits in the active associations are not lawyers of high standing and above reproach, nor does it necessarily mean that our ablest lawyers are not members of bar associations. On the contrary, those upon whom the creative work of such associations falls, and to whom is largely due whatever beneficial reforms have been accomplished, are lawyers of unquestioned mental strength and men of rigorous and exact ideas of professional ethics. The membership rolls of the most active State bar associations include the names of a number of the most capable attorneys,

but unfortunately the contribution of those whose service such associations most need, ends there. When such men begin to appreciate the fact that they owe that oft spoken of "duty to their profession," we may entertain hopes that bar associations will become really powerful agents for the promotion of legal reforms.

And now permit me to submit a few suggestions, which I make bold to say are intended to be practical remedies:

1. There should be an immediate organization of State bar associations in all of the States in which they are not already organized, notably, Pennsylvania, Massachusetts, New Jersey, Indiana, and Colorado.

2. All bar associations are too much organized. Their constistitutions should be simplified, and the responsibility for the conduct of the work thrown upon a few. Confine the direction of affairs within well defined banks, instead of permitting it to spread like an idle, stagnant marsh over a multitude of vice presidents, local and general councils and committees. This is not a criticism of the organization in New York, but is intended for the States in which the complaint is made that there seems to be no one responsible for the prosecution of the work of the association.

3. The American lawyer loves to talk, and resolve, and after resolving, to talk some more on the resolution, and that is usually the end of it. Put a quietus on this. Let us have discussion and plenty of it, provided it is directed to some practical end. Those especially interested in certain reforms, should prepare bills, discuss them and amend them, but do not put them over until the next session. Do something with them. Model them to the satisfaction of a wise majority, and place them in the care of committees charged with the duty of urging their enactment. Do not choose lawyers to serve on those committees who are noted and skilled lobbyists, because the suspicion of the average legislator is aroused at once, and the bills are bound to be hung up. Constitute the committees of earnest and vigorous men, well known if you please, but not tainted with the reputation of the "third house." If they are unfamiliar with legislative methods, no matter. The counsel and advice of those who are acquainted with the law-making machinery, can always be secured. It is very often profitable, just as your Association has repeatedly done, to take up a practical question for discussion with the idea of thoroughly ventilating it, and eventually instructing a committee to prepare a bill or take certain action to put into effect the sentiment of the organization. But it too often

happens, in the majority of bar associations, that the sentiment takes the form of a resolution, "That it is the sense of the association," which ever afterwards slumbers peacefully in the records of the organization, rather than the form of a motion instructing a committee to do something practical at once.

4. More of the leaders in the profession, the busiest of the lawyers, must be impressed into the active work of bar associations. The renowned jurists of the early English law, in beautiful, sonorous, well-rounded phrases, have told us that an attorney is an officer of the court, that he is the conservator of liberty, that his strong right arm should always be raised in defense of the rights of the people, that because of his training and superior intellectual attainments, the community looks to him to guide legislation and protect helpless interests from vicious laws. The young practitioner, just graduating from a law school, has these things repeated to him by his instructors, and in addition he is admonished to be conscientious, to lead a professional life of rectitude, and above all, to be faithful to his client and the public weal. In periodicals, in addresses before bar associations, and in toasts at bar banquets, the subject of professional ethics is discussed in sentences of marvellous rhetorical beauty and strength. But it is a notorious fact, that barring exceptions of course, the strongest and ablest men of the profession stop short after their sermon, and go back to their offices and plunge into their business again, until the next annual meeting or banquet. There is a practical method, I think, by which bar associations can utilize the services of such lawyers, to which I will allude at the end of this paper.

5. If we are to improve the character of the bar of the future, it is necessary that the standard of legal education be raised, and admission to the bar be guarded more strictly and faithfully. The science of jurisprudence is just as much a science as medicine, and it is my personal opinion, which may not be shared by other perhaps, that if the science of medicine cannot be properly mastered by less than four years of study, neither can the science of the law. The science of medicine is being taught more and more by means of clinics, and I think that legal clinics, moot courts and practice courts, can be multiplied with advantage in the study of the law. If four years study of the law should be made necessary in New York, for instance, four years should also be required in Texas, and in every other State. If a State Board of Examiners is established in Maine, to conduct all examinations for admission under certain

prescribed rules, a State Board of Examiners governed by the same or similar rules, should be created in every other State. The natural sponsors of legislation having for their object the leveling of requirements for legal education and admission to the bar, are the State bar associations. If such requirements could be made uniform throughout the country, there would be no *raison d'etre* for those laws which regulate the admission of a practicing attorney of one State to the privileges of an attorney in another State, it would then be "a member of the American Bar," and not a member of the Indiana Bar—in which state there are no requirements for admission —or a member of the New York Bar, in which State the requirements approach the nearest to the ideal.

6. State bar associations should attend at once to the enactment of a law creating commissions upon the uniformity of laws, in those States where they have not already been appointed, and co-operate with such commissions in securing the enactment of the bills for uniform laws prepared by the annual conferences. These bills cover only such reforms as the entire body of American lawyers already heartily endorse, and the only stumbling block to the effectuating of these reforms is the indifference of lawyers.

7. As has already been observed, codification, in some form or under some other name, is an irresistible force, and its direction into other channels is the legitimate work of State bar associations. The gold and the clay idol, and human religious sacrifice, the dug-out and the stagecoach, the lance and the thumb-screw, the incantation and the magic cure, are passing and past, and in their places are a simple religion of honest living, a commerce with the ocean greyhound and the limited express, a government of arbitration and individual rights, and a science built upon reason and understanding. If there has been growth and development in everything else, is there any justification for clinging to the crudities, excrescences and hollow shells of the early English law? Does not the boasted conservatism of our profession at times verge upon fossilism? Cannot we preserve our reverence for the good old things of feudal and baronial times, by embalming them in our memories? They have served their purpose. The clumsy machinery of the law of that period cannot stand the rack and the wear, the hustle and hurry of the present. In the manufacturing world, one man can do the work of three or more, by the use of improved appliances. If the law is re-habilitated, renovated, and reconstructed, with wisdom and moderation, does it not reasonably follow that the administration of justice would be

facilitated, and the number of judges of our courts of last resort be reduced instead of increased? Such reconstruction is nothing but codification or its equivalent, by whatever name you choose to describe it. It is an irresistible movement that is growing and developing, and it is the peculiar office of bar associations to facilitate and direct its growth wisely and practically. I cannot help but feel, in spite of my efforts in this paper to submit something in the way of practical suggestion, that I have indulged too liberally in "should be's," that I have criticised the present tendency of bar associations, and attempted to state methodically in what their true mission consists, but have suggested no plan under which they can be made to accomplish that mission. I do not propose to abandon the discussion without offering some plan, but I must confess that I do so with the feeling that even though I have made a special study of the matter, I am daring a great more than one of my experience and knowledge of the profession should attempt.

The history of State bar associations justifies the statement that as now constituted and conducted they are far from being as serviceable to the law, to the profession, and indirectly to the people, as they ought to be. This is chiefly and primarily because the lawyers of the country fail to appreciate their duty as semi-public officials, or, as I have already emphasized, the profession is saturated with indifference. The whole problem therefore is how to arouse them from this indifference, how to drag them from the absorbing pursuit of power and wealth, and enlist them in the cause of law reform? I trust you will suppress your astonishment, and pardon the apparently commonplace remedy which I propose. I think you will all agree with me that the moving force, in undertakings great or small, is invariably the personality and enthusiasm of one individual, whose whole time and mental strength and energy are given to the prosecution of the work. The State bar associations of the country, collectively, compose a vast army of intelligent, intellectual and influentual men. If their brains and influence could be concentrated upon any single good purpose, they would constitute a force which would be simply irresistible.

At present state bar Associations do not exist in all the States in the Union. Where they do exist, they are either absolutely inactive, or they work at cross purposes, or their activity is confined to fruitless annual meetings, or at the best their influence is weak and accomplishes reform by a painfully tardy process. The need of the hour seems to be—I hardly know what to name him—a National organizer, or a National Secretary, or a National official, no matter

what his title, whose duty it shall be to organize State bar associations in every State and Territory, to work incessantly, and by practical methods, to maintain among the profession in each State an interest and enthusiasm in the work of such associations, to have a central office, to place himself in communication with the executive officers of every State bar association, and if you will pardon the taint of slang, to keep things hot and moving, all the time. Suppose for instance, the National Conference of Commissioners for Uniformity of Laws should prepare a bill for a uniform law for the acknowledgment and execution of deeds (it has already been done), concerning the necessity for which the entire American Bar is of one opinion. Let the draft of it be handed to this National organizer or secretary for reference to every State bar association. The duty of that official would be to keep track of the bill in every State, see that it is introduced by the bar associations into the several legislatures, and that proper and competent committees are appointed to urge its enactment. He should not rest, but should camp on the trail of every such bar association committee, until the bill became a law in every State in the Union. Take another instance. Suppose that the American Bar Association should come to the conclusion and prepare a bill to the effect that, for the present at least, three years study of the law should be required before admission to the bar, and that paid State Board of Examiners should be appointed in each State. It would be the duty of this National secretary, to submit the bill to each State bar association, urge its endorsement, and introduction into the several legislatures by them, and if unable to accomplish the enactment of that particular bill, persistently advise with the committees of the several bar associations until they secure legislation which shall at least raise the standard for admission in all of the States, and hasten the time when the requisites will be identical throughout the country.

The expense of the prosecution of such work, if borne by all of the State bar associations, would be inconsiderable. It would be difficult to select a lawyer qualified for the peculiar duties of such a position. It would demand one of experience, energetic, persistent, and above all, an earnest and enthusiastic advocate of law reform. There are very many ways in which a central office, devoted to the advancement of law reforms, could be utilized. The National Secretary of whom I speak, could not only organize State bar associations, keep them alive and active, be instrumental in the passage of all kinds of bills having for their object the raising of the standard of the bar, and making laws un-

iform, but he could collect information bearing upon the practical workings of various codes, in the several States, point out defects in the code laws, keep a watch generally upon State legislation, and collect a fund of information concerning statutory law which would be valuable to practicing lawyers who are members of State bar associations. I could consume pages in amplifying upon the practical uses to which an office of this description could be put, but it was my purpose to simply give expression to the idea.

It may be that this particular plan is impractical, and I am free to confess that I anticipate that it may be so considered. Nevertheless, my study of the history of State bar associations, with especial reference to their influence and legislation, and their work in behalf of law reform, has thoroughly convinced me that the alleged conservatism of the profession is really not so much conservatism as it is indifference, and that a proper appreciation of the necessity for such change and improvement as will keep the law and the profession abreast of the times, will not manifest itself unless someone employed or self-appointed, devotes his entire time and energy to undermining and destroying this apathy among lawyers.

I cannot more appropriately terminate this paper than by quoting the graceful sentiment expressed by the Honorable John F. Dillon in the last of his admirable series of lectures to the students of the Yale Law School upon "The Laws and Jurisprudence of England and America":

"And generally, the forecast may be ventured, that while the law will in its development undoubtedly keep pace with the changing wants of society, yet the work of jurists and legislators during the next century will be pre-eminently the work of systematic re-statements, probably in sections, of the body of our jurisprudence. Call it a code, or what you will, this work must be done. If not done from choice, the inexorable logic of necessity will compel its performance. It seems to me to be reasonably clear, that in these and many other respects, our laws and jurisprudence are likely to undergo essential changes. Scientific jurisprudence, already a necessity, will play a more important part in the future of our law, than it has in the past. It is a mistake to suppose that the jurist any more than the legislator, must look only to the past. He must also study the present, and bring himself into actual contact with the existing conditions of society, its sentiments, its moral convictions, and its actual needs. And the work must be done with all the aids that the learning and experience that the past affords, and under the inspiration of a higher ideal than the existing state of our law supplies.

"This work, as important, as noble, as any that can engage the attention of men, will fall to the profession to do, since it cannot be done by others. It rests therefore, upon the profession as a duty. It will not be performed by men whose sun like mine, has passed the zenith, and whose faces are already turned to follow its settling. I address young men, men who are hailing the advance of their sun up the eastern sky, and who are full of the hopes, the aspirations, the generous illusions, the sublime audacity, which give to that interesting stage of life, when animated by high resolves, a present charm and a prophetic splendor all its own. No single laborer, unassisted, can do much in a work so vast. It is indeed, a work which must be done more or less in compartments, and it is given to every earnest and devoted lawyer to do in his day and generation his utmost part, however humble."

## THE JUDGE AND THE JURY-MAN.

HON. ROBERT E. FRAZER.

We are well aware of the important questions which jurymen are called upon to determine, and of the difficulties encountered in arriving at a proper conclusion. The determination of these questions frequently calls for thorough knowledge of the English language, good judgment, discriminating intelligence, and sufficient firmness to do the right without regard to sympathy or consequences. We know that there is rarely, if ever, a panel of jurymen drawn that comes up to these requirements. Sufficient care is not exercised in placing the names of proper persons on the list from which the jury is to be drawn.

If any of you have talked with jurymen and heard them assign reasons for their verdicts, you have no doubt discovered that in spite of the testimony, the arguments of counsel and the charge of the court, they have often failed to grasp the point in issue. The practice of the court which requires the judge to instruct the jury as to the law, and to give requests of counsel, requires, in order to understand properly the force of the propositions stated, a mind of clear and intelligent discrimination, such as the average juryman does not possess. Jurymen are frequently selected for the reason that they are old and respectable citizens, or that they are poor and need the job for the pay that there is in it, or that they have a political pull, or that they have nothing to do, and busy men have no time to serve. They are frequently men who have not sufficient knowledge of the English language to understand either the precise meaning of the testimony, the arguments of the lawyers, or the charge of the court, and still in every circuit such men are called upon daily to decide the most difficult and important questions. Who is to blame for this condition of things, and what is the remedy?

In the first place, there should be fewer exemptions from jury duty, and the time-honored excuse that the business of the persons called to jury service would suffer, should not be a legal reason for not serving, aud should be allowed only in extreme cases.

The persons who select the jurymen should exercise greater care in their selection.

The law as it exists at present is ample so far as it fixes the qualifications of jurors. Let us look at it for a moment and see what it is.

Section 7555 Howell's Statutes is as follows:

"The said officers shall proceed to select from the persons assessed on the assessment roll of the township or ward for the same year, suitable persons having the qualifications of electors to serve as jurors, and in making such selection they shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepit, of good character, of approved integrity, of sound judgement and well informed, and conversant with the English language, and free from all legal exceptions."

Certainly the requirement of the law as to the qualifications of jurymen is ample; and if men of this kind only were returned as jurymen, it would be all that could be expected. That jurymen do not always come up to these requirements must be conceded. I know of no way by which the officers charged with the duty of selecting only such persons can be compelled to do their duty; and I do not know that it would be possible for them, under the present system, to enter upon a sufficient examination to properly decide it.

It would seem to me that the law does not contemplate that persons different from those described in the statute should be allowed to sit in the jury-box. The question arises as to who, when the jury has been drawn and appears in the court room, is to determine whether they are the kind of men designated by the statute, and to whom is confided the important trust of deciding the vital questions of fact, involving the most sacred and important rights of their fellow citizens, and from whose decision there is no appeal.

The whole thing seems to have been left to take care of itself. The lawyers make their challenges, peremptorily or for cause, and still there may be left upon the jury, with no apparent way to get rid of them, men who have not and never can have any correct conception of questions submitted to them.

I think the judge has it in his power to determine whether the jurymen come up to the requirements of the law, and if he decides that they do not, he could excuse them from attendance on the court. The only cases in which I have known this to be done where when a juryman was so deaf that he could not hear a word the witness said. If the judge could excuse a juror for such reason, there is no doubt in my mind that he could excuse him because of deficiency in any of the other qualifications required by law.

Would it not be well enough for the judges to take this matter in hand and make a careful investigation to see what manner of

men compose this important branch of the court? And would it not be a good thing to have the legislature prescribe the manner in which this investigation should be made?

I have thought it would be a good idea for the legislature to require that a commission be appointed in each county, to consist of intelligent, capable men, selected for their fitness, to serve without compensation, before whom might be summoned every man drawn as a juryman, to be subjected to examination as to all the qualifications required by law, and if he fell short in any of them in the opinion of the commission, they should have full power to reject him.

It is the merest humbug to have such qualifications prescribed by law, and then have the law ignored or disregarded. Were the qualifications required by law possessed by jurymen, there would be less talk of ignorant juries, and there would be no talk of corruption in the jury-box.

Is not this subject of sufficient importance to deserve your attention? I offer these suggestions, hoping they may bear some good fruit. The rights of us all, in person, property, and good name, rest with those who administer the law, and the manner in which the law is administered depends upon the capacity and honesty of the judges and the capacity and honesty of the jurymen.

## QUALIFICATIONS OF JURORS.

First. They must be honest. Second. They must have a good understanding of the English language. This is very necessary for the reason that there are so many questions which come before them that require the giving of testimony in which technical language is used, and some of the witnesses use such language in expressing themselves that they cannot be clearly understood unless the juror has a good knowledge of the meaning of English words as they are intended to be understood in the connection in which they are used. This also applies to the arguments of counsel and the charge of the court. Cases frequently turn on fine distinctions both as to questions of law, and also as to the the applications of the law to the facts. Evidence is frequently admitted for a certain purpose, and the jury are not at liberty to apply it to other questions in the case. This requires not only a good knowledge of the language, but also a discriminating understanding.

A juryman should be a good judge of human nature. This is very necessary in determining whether a witness is, or is not telling the truth. The manner of giving his testimony. The connection that what he is saying, has with what he has said. His opportunities for knowing the thing he swears about. Whether he is reckless or cautious in what he says. So while a witness may intend to be honest, his recklessness or thoughtlessness may destroy the weight of his testimony.

These things and many others which might be suggested, show the necessity of a juryman being a man of the best mental qualifications; in fact his duties call into play the best faculties of the human mind.

There seems to be an idea prevailing—that juries would be all right if they were composed of business men. My experience has shown me that some business men make very poor jurymen. The test is the personal qualifications of the man, not the class from which he comes.

Jurymen should be selected with the greatest care, by men thoroughly competent to make the selection, for to them is confided the gravest responsibilities, in deciding the right to life, liberty and property of the parties before them. They are supreme on questions of fact submitted to them for determination, and from their decision there is no appeal—it is final—it is absolute. If men with the qualifications required by law are selected to serve as jurymen, there is no better or safer way of determining questions of fact. But to confide such powers to ignorant or vicious men, is to uselessly imperil human rights. It makes the courts a laughing-stock, and the administration of justice a solemn farce.

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The following bill drafted by Mr. Jasper C. Gates, embodying Judge Frazer's views as expressed in the foregoing article, has already been presented to the legislature.

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An Act to amend section five of Act number two hundred and four of the public acts of one thousand eight hundred and ninety three, entitled; "An Act to create a board of jury commissioners consisting of seven persons for the courts of record in the County of Wayne and to repeal Act number ninety five of the Public Acts of eighteen hundred and eighty seven, as amended by Act number forty-two of the Public Acts of eighteen hundred and ninety one and all other acts and parts of acts contravening the provisions of

this act," so as to prevent persons not properly qualified as such from serving as jurors in courts of record in said County.

SECTION 1. *The People of the State of Michigan enact;* That Section five of Act number two hundred and four of the Public Acts of one thousand eight hundred and ninety three, approved June first one thousand eight hundred and ninety three entitled: "An Act to create a board of jury commissions consisting of seven persons for courts of record in the County of Wayne, and to repeal Act Number ninety five of the Public Acts of eighteen-hundred and eighty-seven as amended by Act Number forty-two of the Public Acts of eighteen hundred and ninety-one and all other acts and parts of acts contravening the provisions of this act," be and the same is hereby amended so as to read as follows:

Sec. 5. The persons whose names shall be returned by said board of jury commissioners shall be suitable to serve as jurors. They shall have the qualifications of electors in the town or ward in which they reside and for which they are returned by said board; they shall be persons of good character, of approved integrity, of sound judgement and well informed, conversant with the English language, in possession of their natural faculties, not infirm or decrepit, and otherwise free from all legal exceptions. No person shall be returned or shall be qualified to be or become one of a panel of petit or grand jurors in any court of record in Wayne County who within three years prior thereto has been or acted as a member of a panel of petit or grand jurors, whether summoned on the original panel or added thereto as talesman, in a court of record, except as otherwise provided in section twenty-one, and it shall be the duty of each of said courts on the return day of the venire to inquire of the jurors summoned if any of them have served as jurors during the proceeding three years and to excuse from service any jurors who have so served. It shall also be the duty of the judges of each of said courts by special orders to be entered upon the court journal to cause examination and investigation to be made into the qualifications of each and every juror, who shall be summoned as provided by this act, and to direct the manner in which such examination and investigation shall be made; and neither of said courts shall allow any person to be or become one of a panel of petit or grand jurors therein until it shall be made to appear to the satisfaction of such court, after such examination and investigation, that such person has all the qualifications specified in this section. It shall also be the duty of each of said courts forthwith to excuse from service

as jurors any and all persons who shall not so be shown to possess all of such qualifications. The particular manner in which such examination and investigation has been made shall be set forth in the journal of said court; and it shall be a just cause of challenge to any juror in any cause, over and above all other challenges allowed by the law, that it does not so appear in and by said journal that such juror has all of said qualifications. And it shall also be the duty of each of the judges of said courts, whenever he shall have reason to doubt whether any person in attendance upon said court as a juror is possessed of all of said qualifications, forthwith to excute such juror from further attendance and service as such juror.

## *SENTENCES AND PARDONS.*

GOVERNOR RICH.

*Gentlemen of the Association of Circuit Judges of Michigan:*

It is with great reluctance that I appear before you to offer some suggestions in the direction of your official duties. My only reason for doing so is the experience and knowledge which comes to me through applications for pardon. My conclusions may not coincide with yours, but I will simply give you the impressions which come to me, and which you will, of course, take simply for what they are worth.

It has occurred to me, in considering pardon applications that a first offender, one not belonging to the criminal classes, and apparently without the criminal instinct, can hardly be sentenced for too short a time under the provisions of our laws. It would be better in cases of short sentence to make the confinement more rigorous than it ordinarily is in our penal institutions. For a second offense the sentence should be much longer, and for a third and subsequent offence it should be for the full extent of the law. In such cases it is obvious that the offender has joined the criminal classes, and it would seem useless to put the people to the expense of conviction and reconviction.

I find a very great difference in the length of sentences imposed for the same offense. Prisoners working side by side and realizing this difference are not disposed to look either with kindly feelings or with much respect upon courts of justice when this great disparity in penalties is shown. In many cases there is undoubtedly some peculiar reason for this disparity of sentence. Of course there would be a difference in the views which different judges might take of it, but even this does not account fully for the difference in length of sentence for similar offences. When application is made for pardon, as it frequently is, some years after sentence, it is very difficult to get at the real facts in the case, and where they do not have to meet with opposing counsel, or witnesses, it is made to appear sometimes that criminals sentenced for a long term of years for some heinous crime, deserved reward rather than punishment, and it is impossible for the Pardon Board, or the Executive to ascertain the facts. This is especially the case where one is sentenced on a plea of guilty. I

realize that it is easy to assume that one who has pleaded guilty need not ask for a pardon on the merits, but experience had led me to look with more than ordinary suspicion on a plea of guilty. I will illustrate. During the autumn of 1893, I had occasion to visit the Marquette prison in company with the Pardon Board. Among the applicants for pardon or other consideration at the hands of the Board was a young man who asked for a pardon on the ground that he was not guilty. He had been sentenced for four years for attempt to commit rape, on a plea of guilty. After quite a severe cross-examination, in which he could not be made to vary in any particular from his original statement, I caused an investigation to be made, from which I became satisfied that he was the victim of a conspiracy. The prisoner did not have intelligence enough to know technically whether he had had an examination before a magistrate or not. After I had heard his story I asked him why he did not lay the whole matter before the judge. He said he had been told by one of the officers that six witnesses would appear against him, and if convicted he would be sentenced for twenty years, and that if he pleaded guilty he would only receive a short sentence, and when the judge asked him if the plea was made of his own free will, he said, "I was all of a tremble, and told the judge it was, and to let me off as easy as he could." After the investigation, I think the judge, prosecuting attorney, and all connected with the case, became satisfied that the young man was innocent. It is needless to say he was released without unnecessary delay. Now, it occurs to me from this stand-point that is desirable that the judge, in cases of sentence for four years and upwards, should be required to prepare and file a concise history of the case, and to state whether there were any aggravating or mitigating circumstances connected therewith, whether to the knowledge of the judge he had ever been convicted before, and, in short, just such a statement as would guide the pardoning power in determining at a later period just what should be done in the interests of justice. This is more desirable in cases where a plea of guilty is entered than where a trial is held. It has been proposed that the testimony in full be submitted. This might do in some cases, but it would be a voluminous affair, as well as an expensive one, and would not bring out the surrounding circumstances like a statement from the judge, or prosecuting attorney, or both.

The difficulty in arriving at the facts in any given case, especially after several years have elapsed, can only be realized by experience. Even though the judge and prosecuting attorney may be

living, a little time obliterates the main facts from their memories, but if a statement were required to be filled during or soon after the close of the trial, with the reasons for giving a light or severe sentence, as the case might be, and a brief statement in regard to the life, character, surroundings, and if known, the parentage, of the criminal, it would be a wonderful aid in arriving at correct conclusions in pardon matters.

I also desire to call the attention of the judges, especially those coming from circuits in the northern portion of the state, to the fact that while Jackson has more prisoners than it has cells, Marquette, which is the same class of prison, has fewer than half of its cells occupied, and I would suggest in order to avoid the necessity of a transfer of prisoners, and in order to equalize the population to some extent, that long term men be sent to Marquette, at least until this difference in relative population has ceased to exist. There are only about 125 men at Marquette, while it has twice that number of cells. While the expense of keeping prisoners at Marquette is much greater than at Jackson, the greater the number of prisoners, the lower the per capita cost of keeping prisoners at Marquette will be. The State has prison room at Marquette, and it would seem hardly wise to increase the room at Jackson until this is occupied.

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## NOTES.

THE DETROIT CITY RAILWAY CASE SETTLED.—The Detroit Street Railway question was expeditiously though effectually disposed of in an opinion filed by the Supreme Court on the 22nd in the case of *City of Detroit et al. vs. Ellis, Attorney General.* Though the learned Justices unanimously concurred in the conclusion of the opinion, Justice Hooker set forth a distant line of argument in a separate opinion. The court recognized the authority of the City both by charter and general legislative act to exercise full supervision and control over its streets, to regulate and prescribe the manner in which they shall be used, to grant or to enjoin the operation of railway systems within the restrictions of a valid and binding contract; the opinion holds that after all the only question in issue is as to the validity of the consent granted. Counsel for the petitioners had contended that the consent given by the city does not survive to the present company; furthermore that this application to the Supreme Court "is made by the municipal authorities of the City, who are the trustees of the public, for the protection of the interests of the public in the streets." The opinion holds that the matter of consent, having been determined in favor of the company by a court of competent jurisdiction, must be regarded as resadjudicata as against the moving parties, the City of Detroit and certain of its citizens; and further that the adjudication can not be avoided by the simple addition of individual members of the body comprising the municipality.

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THE FINAL CONSTRUCTION OF "DISTINGUISHING MARKS."—Upon a rehearing of the case of *Attorney General ex rel. James A. Scott vs. Charles Glaser*, the Supreme Court in an opinion filed January 8th, materially modifies the original opinion, and thereby re-enforces the construction given in an interesting opinion rendered upon motion granted for the rehearing in question. In the original opinion the court had affirmed with apparent inflexibility that any mark upon a ballot not appropriate and necessary to express the voter's intention should be regarded as a distinguishing mark; and in strict application of this rule, it followed that when the name of a candidate appeared on two tickets, and a cross was placed in an appropriate place on each ticket, or opposite the name of the candidate on each ticket, neither vote should

be counted. Apparently this conclusion was reached "in view of the practical difficulty of applying any other general rule." Inasmuch as this construction is wholly repugnant to that which has been given by the law department of the State and by election inspectors, the court concedes that "sufficient consideration was not given to this fact in reaching the conclusion as stated." The Attorney General in various letters of instruction and in his annual reports had placed a liberal and practical construction upon the letter of the statute. In an opinion to be found in the report of the Attorney General for 1893, it was said: "The fact that the voter has indicated in more than one way that he desires to vote for any candidate on the ballot is no reason why he should be deprived of his vote or the candidate deprived of credit." In consideration of this opinion advanced by the law department of the State, the final opinion states: "It has become a rule of law that the interpretation placed upon a statute by the different departments of the State having a duty to perform under the statute, while not absolutely binding upon the judicial department is to be given weight in a doubtful case. Reconciling the general rule laid down in the original opinion with the fact that there is no express declaration in the statute as to what constitutes distinguishing marks, the court submits that in view of the Attorney General's practical construction, it should be held that the ballots in which a cross was unnecessarily placed opposite the name of the candidate on each of the two tickets are not illegal.

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THE AGREEMENT OF THE MORTGAGOR TO PAY THE MORTGAGEE'S TAX UNDER THE LAWS OF 1891 AND 1893.—In the last issue of the JOURNAL (4 MICH. LAW JOURNAL, 22) we raised the question whether the parol or written agreement of the mortgagor to pay the taxes on the mortgagee's interest was valid and enforceable, and we stated that there was no decision in Michigan directly in point. Our attention has been called to the case of *Common Council vs. Assessors, 92 Mich. 78*, by one of our readers, who is of opinion that that case decided the question. What we wished to discuss was whether the agreement of the mortgagor to pay the taxes on the mortgagee's *personal* interest represented by the mortgage indebtedness, besides paying the tax on the entire real estate could be enforced against him? We probably erred in not making this more clear, for if this is understood it is apparent that the Supreme Court never passed upon the point in the case of *Common Council vs. Assessors*. That case merely construed the mortgage tax law of 1891 (Act No. 200). By the provisions of that act "any real estate mortgage—by which a debt is secured—shall for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged" (Section 2). Further, "the value of the property affected by such mortgage—less the value of the security shall be assessed and taxed to the owner thereof" (Sec. 17). Hence under that law a piece of real estate valued at ten thousand dollars with a mortgage upon it of five thousand dollars was assessed half against the owner of the property and half against the owner of

the mortgage. The mortgagee's interest was a real interest in the real estate, and the mortgager was relieved from taxation to an amount equal to the amount of the mortgage. The Supreme Court in construing that act in the case of *Common Council vs. Assessors* held that it was competent for the mortgagor to agree "to pay all taxes that might be assessed against all interests in *real property* owned by him, including the interest granted to the mortgagee; such agreement not amounting to a reservation of interest, but being in the nature of an agreement to preserve the estate which constituted the security." All throughout that case the Court considered the mortgagee as holding an interest in the real estate as such, whereas under the present law (Act No. 206, Laws of 1893) the mortgagee's interest is a personal one and is regarded for purposes of taxation as personal property. The law of 1891 and the law of 1893 are materially different in regard to the taxation of mortgages, and no case construing the one is of any assistance in construing the other. The former only taxed the mortgaged property, the mortgagee being obliged to pay a part of the tax on the land. Tho later assesses the full value of the property to the mortgagor and also assesses the mortgagee's personal interest in the mortgage. The question is, whether under the law of 1893 the mortgagor can legally bind himself to pay the tax on the land and the personal tax on the mortgagee's interest. The case referred to did not touch upon this point at all.

We are still inclined to believe that the rule which we laid down before-namely that if the interest reserved in the note and mortgage and the tax on the mortgagee's interest do not together exceed the legal rate of interest, that then the agreement to pay the mortgagee's tax is valid and enforceable, otherwise that it is not.

## RECENT MICHIGAN DECISIONS.

ADVERSE POSSESSION:—1. In an action for the recovery of land testimony that a fence had been used as a line fence for a number of years, and that wood had been cut on the strip by defendant at different periods, for 25 years, and showing other acts indicating ownership up to the line of the fence, it was held to be sufficient to show adverse and hostile possession of the land in question. 2. Title by adverse possession is not waived by a parole agreement to join in a survey to determine the true line. *Lamoreaux vs Creveling, Adm.* (Jan. 4.)

ALTERATION IN CONTRACT:—An alteration made in a written contract which does not change the effect of the instrument is an immaterial alteration and will not preclude recovery. *Prudden vs. Nester.* (Jan. 8.)

BENEFIT INSURANCE:—Where the laws of a benefit society provide that "further proof may be required if deemed necessary by the supreme commander" the society cannot demand further proof of loss after the usual proof has been made, unless the supreme commander personally "deems" it necessary. *Tessman vs. United Friends of Michigan.* (Dec. 18.)

BOND ON APPEAL—CLERICAL ERROR:—In a suit on an appeal bond, a clerical error whereby the amount of the judgment appealed from is stated as "twn" hundred instead of two hundred dollars, will be disregarded. *Tenhopen vs. Taylor.* (Dec. 18.)

CANCELLATION OF INSURANCE:—An agent who has entire charge of the insurance upon property of his principal may accept notice of the cancellation of a policy and procure substitute insurance upon the same property in another company without previous notice to his principal, and the policy last issued will be valid. *Buick vs. Mechanics Insurance Co.* (Dec. 18.)

CHATTEL MORTGAGE:—The record of a mortgage of land in the office of the register of deeds is not notice to the world of a mortgage of chattels included in the same instrument. *Ramsdell vs. Electric Light Company.* (Dec. 18).

CONTRACTS:—A quantity of cedar ties, were sold with the privilege of rejecting such as were unsound. Those rejected were marked and afterwards thrown into the lake. Held: That the vendee was not guilty of conversion unless he was shown to have rejected sound ties which were afterwards by his order destroyed. *Turnbull vs. Widner.* (Jan. 4.)

CONTRACTS:—Where the owner of land writes a person in a distant city that he will take for the land a certain sum net, and such person answers that he accepts the offer, and requests the owner to send a deed to parties named, in such city, to whom he will pay the money on receipt of the deed, there is no completed contract, the offer implying payment at the owner's residence. *De Jonge vs. Hunt.* (Dec. 18.)

CONTRACT FOR FUTURE EMPLOYMENT:—An acceptance for fifteen years, without protest, of a less sum than that stated in a written agreement, will unexplained amount in law to a waiver to a subsequent claim for the full amount of the salary. *Brighten vs. Railroad Co.* [Dec. 28.]

CONTRACT OF LEASING:—Plaintiffs who has entered into a business partnership, recovered damages for the failure of defendant to deliver over premises rented to them on a lease running to only one of them. Two other of the plaintiffs were held in the lease as sureties for the payment of the rent reserved and *one individual was joined as plaintiff who was wholly foreign to the lease.* It was held: That judgment should be reversed and entered for defendant. *Burwitz vs. Jeffers.* (Jan. 4.)

DEED—RAILROAD RIGHT OF WAY—ABANDONMENT:—1. A deed which by its granting clause, conveys "the right of way for a railroad * * * and described as follows: 'A strip of land forty feet wide, * * * and being nine hundred and fifty-two feet in length,'" though in the usual form of a full warranty deed conveys an easement therein only, and not a fee. 2. Evidence that a railroad was taken up, the rails and ties removed, the fences taken away, and the bridge across an intersecting river torn down and all with a view of abandonment, is sufficient to show an abandonment of the easement of the right of way. *Jones vs. Van Bochove.* (Dec. 18.)

DISCONTINUANCE OF ACTION—CONSENT OF ATTORNEY:—A discontinuance of an action for personal injuries will not be set aside because the stipulation is filed without the knowledge or consent of plaintiff's attorney. *Voigt Brewing Co. vs. Donovan, Circuit Judge.* (Dec. 18.)

ELECTION BALLOTS:—Where ballots are used on which two tickets appear with a duplication of the name of a candidate for the same place on both tickets and a cross is placed in an appropriate place on each ticket, the ballot should be counted for such candidate. The fact that a voter has indicated in more than one way that he desires to vote for any candidate on a ballot should not deprive him of a vote thus expressed. A mark placed upon a ballot by a voter to express his intent, must be such a mark as is contemplated by the statute. *Attorney General ex rel. Scott vs. Glaser.* [Opinion on rehearing (Jan. 8.)]

ESTOPPEL—TROVER—SET OFF:—1. Where defendant promised to return on demand money deposited with him by plaintiff, which he knew she claimed only by virtue of her husband's consent, he cannot in defence of an action for such deposit, show title thereto in the husband. 2. In trover to recover money which came into defendant's hands as attorney for plaintiff, defendant may set off his claim for services as such attorney in reduction of plaintiff's damages. *Pierce vs. Underwood.* (Dec. 18.)

EXECUTION:—Execution on a judgment for the posssession of land may be issued in vacation as a matter of course if the time limited for the stay of execution has expired. *Christler vs. Locke.* (Dec. 18.)

LEASE ON SHARES—FORFEITURE:—1. A lease of land on shares is not assignable by the lessee without the consent of the lessor. 2. Such a lease is forfeited by assignment, and the lessor may take immediate steps to recover possession of the premises from the assignee by summary proceedings. *Lewis vs. Sheldon.* (Dec. 18.)

STAY BOND—SATISFACTION BY LEVY:—A bond reciting that the surety will pay the judgment against defendant at the end of six months intended by the surety magistrate, and plaintiff in the suit to operate as a statutory stay bond, but defective as such will be considered a common law obligation to pay the judgment. 2. A judgment is not satisfied by the levy of an execution on the debtor's property, when the property is left in the debtor's possession and by him placed beyond the officer's control. *Lustfield vs. Ball, Sheriff.* (Dec. 18.)

SNOW ON STREET—LIABILITY OF CITY:—A city is not liable for personal injuries caused by an obstruction in the street formed by snow thrown from the sidewalk, and that thrown from the street car tracks. *Hutchinson vs. Ypsilanti.* (Dec. 18.)

TELEGRAPH COMPANIES—LIABILITY:—In the absence of any statutory provision telegraph companies are not common carriers and a regulation printed on their blanks limiting their liability for mistakes and delays, delivery or non-delivery of unrepeated messages, is a reasonable one and binding upon the sender, whether brought to his knowledge or not. *Birkett vs. W. U. T. Co.* (Dec. 28.)

TRESPASS:—Where a party lawfully enters and is lawfully in possession of certain lands through a license granted him by the owner, such possession cannot afterwards become tortious, and its use a trespass, even as to a subsequent grantee who takes without reservation. *Scarvell vs. R. R. Co.* (Dec. 28.)

TRUST DEED.—An agreement in a trust deed. that upon the happening of certain contingencies therein named, the trustee may take possession of the property without foreclosing and waiting for the expiration of the period of redemption, will be specifically enforced by a court of equity, yet such power will only be exercised in a case where the right is clearly given by the engagement of the party. *Michigan Trust Company vs. Lansing Lumber Co.* (Dec. 28.)

## *UNIVERSITY LAW SCHOOL NOTES.*

The registration in the law department has now reached 640, as against 597 last year.

A student was heard to remark a short time ago that Equity was about as hard to comprehend as Eternity.

A movement was started a short time ago by the Senior Class which has resulted in the selection of Mr. Taft, a Chicago sculptor, to make a bust of Hon. Thomas M. Cooley, which the class will place in the law library. It is felt that this will be a fitting tribute to one whose name was so long identified with the school, and to whom so much of its success is due. Mr. Taft will also make a bust of President Angell for the Senior Literary class.

The editors of Res Gestae, the Senior Annual for 1895, will select part of their matter on the civil service plan. They have announced that competions will be offered to secure two poems, a legal romance, designs for cover and title page, and designs for cuts illustrating legal terms. These competions are open to all law students. Members of the Senior class may also contribute in competition a thesis on some legal topic. The publication will appear early in the spring.

Prof. "What right did the wife have at the common law designed to secure her maintenance after her husband's death and before the assignment of her dower?"

Student No. 1. "She had the right to remain in her husband's castle forty days after his death."

Student No. 2. "I don't understand how the mere right to stay in his castle was going to secure her maintenance."

Student No. 1. "Oh! she could rent rooms."

*The New Quiz Schedule.* There is no more striking difference between the work of the law school at the present time and that of five years ago than is to be seen in the system of quizzing on the lecture work. Then it was customary for the lecturer to spend half an hour at each lecture in quizzing about 275 students. Each student would, on the average, be called up once in every forty lectures. It is needless to add that for the purpose of testing the work of the student, this system was not effective, valuable as it may have been as an adjunct to the lecture itself. At the beginning of the present school year last October, the old plan had been so far changed that each class was divided into five sections, and all regular subjects were quizzed on, not only by the lecturer in connection

with the lecture itself, but were also gone over systematically by men who made that their sole business, in sectional quizzes. It at last became evident that the highest efficiency in this work could not be attained with from sixty to sixty-five men in a section. Consequently the faculty early in January recast the schedule, dividing each class into ten sections instead of five. As a result the instructors are now able to spend at least two minutes in quizzing each man, and there is usually ample time for the necessary explanations and illustrations of principles. This change, of course, doubles the number of hours spent in recitation work by each instructor, but the improvement in the character of the quizzes is more than a compensation for the additional labor.

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*Law Courses in the Summer School.* At a recent meeting of the law faculty it was decided to introduce several courses in law into the curriculum of the Summer School. Last summer was the first season during which systematic instruction in any university studies was offered, and then no attempt was made to secure classes in law; but it is now thought that some instruction in the fundamental legal ideas and principles should be placed within the reach of those who are able to come to the University only during its summer session. In the selection of the courses, no effort has been made to have them correspond to any specific courses presented in the regular schedule of the department. They are rather designed to meet the wants of those teachers and students who may need some legal knowledge in their regular work, or as a guide in the practical affairs of life. They will also be found of benefit to those who, intending to become students of law, may wish to take an introductory course which will ground them in the fundamentals before entering upon the more technical work of the law school. The courses offered for the coming season are as follows:

1. Elementary Law. A course designed for those who wish a general knowledge of the law as a preparation for a course of legal study or as a branch of a liberal education. Conducted by Mr. Walter Denton Smith.

2. Constitutional Law. A treatment of the nature of constitutions in general, a comparison of the constitutions of some of the most prominent modern states, and a thorough discussion of the text of the federal constitution as construed by the Supreme Court of the United States. Conducted by Mr. John W. Dwyer.

3. Laws of Business and of the Domestic Relations. A practical course in general business and family law. Designed to fit those who take it to proceed intelligently in the conduct of their business affairs. Conducted by Mr. Thomas W. Hughes.

## CURRENT LITERATURE.

The *Illustrated American* all throughout January has been unusually interesting. "The Seven Deadly Sins of America" and the articles on Plays and Players have been continued from week to week. The last number contains a severe arraign ment of Cleveland's administration written by a self-styled "Uncompromising Democrat."

Mrs. Wade's novel, A Singular Life, occupies the first place in the *February Atlantic*. The three short stories written by Miss Jewett, Mrs. Wiggin and Miss Ewell exemplify the fact that women excell in that class of fiction. A contributor in the Club writes entertainingly of the Mugwumps; He classes Erasmus, Lucius Cary, the Girondins and others as being among their number.

Col. Carroll D. Wright has contributed to the February *Forum* an article entitled "Steps towards Government Control of Railroads" showing how the Chicago Strike has emphasized the need of legislation for the regulation of strikes; and how it is also a factor in producing the changes in Federal law which are now going on and which tend to governmental control of railroads.

The *Review of Reviews* for February fully sustains its reputation of reviewing all the important contributions of the principal magazines of America and Europe. The special features are, "The World's Event for 1895," a description oi the exposition at Atlanta; "Canada's Prairie Commonwealth," which is a study of civil government in Manitoba; and sketches of Robert Louis Stevenson and Anton Rubinstein.

The January number of *Littell's Living Age* contains, among many other articles of interest, biographical sketches of Theodore Hook, Robert Louis Stevenson and James Anthony Froude. The House of Lords is discussed in the first two numbers by Sidney Low and Lord Hobhouse. In the two numbers following General Evelyn Wood describes the Crimea as seen by him in 1854 and 1894.

Public attention is now pretty generally directed to the question of finance. How to reform the National Currency is a question that must soon be solved. The best way to arrive at a conclusion is to obtain the views of all parties. There is no better way to get this than through *Public Opinion*. For this one purpose it is worth much more than the subscription price for a year.

The February *Popular Science Monthly* contains another article from the pen of Prof. James Sully entitled "First Attacks on the Mother Tongue." In it he describes the manner in which children learn to imitate speech and to apply words, and accounts for some of their mistakes. Dr. Samuel T. Armstrong, visiting physician to the Hospital for Contagious Diseases, New York, explains the Serum Treatment of Diptheria.

The leading feature of the February *North American Review* is an important symposium on the Currency question entitled, "The Financial Muddle," the contributors to it being the Hon. J. Sterling Morton, Secretary of Agriculture, the Hon. William M. Springer, Chairman of the Committee on Banking and Currency, and President Henry W. Cannon, of Chase National Bank, New York. Albert D. Vandum contributes the second of his series, "Personal History of the Second Empire." Other short articles are: "Images in Dead Eyes," by Dr. Ellerslie Wallace; "How to Repel Train Robbers," by Lieut. J. T. Knight.

The February number of the *American Magazine of Civics* contains a varied list of important topics ably presented. "Money," "Prison Reform," "The Catholic Church and the Coming Social Trouble," "Elements of Good Citizenship," "Economic Co-operation," "Woman Sufferage," "Compulsory Voting," and many other subjects of general interest are discussed in this number.

# MICHIGAN LAW JOURNAL.

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## *THE AMERICAN BAR ASSOCIATION.*

S. M. CUTCHEON.

At the Annual meeting of the American Bar Association, held at Saratoga Springs in August last, the members in attendance from Michigan extended an invitation to the Association to hold its next meeting at Detroit. Although the great attractions of Newport were urged in favor of that beautiful summer resort, Detroit was chosen, and the eighteenth annual meeting will be held in that city, Wednesday, Thursday and Friday, August 28th, 29th and 30th, 1895.

The Association was organized at Saratoga Springs in August, 1878, in response to the following call:

CALL FOR A MEETING

to form an

AMERICAN BAR ASSOCIATION.

DEAR SIR:

It is proposed to have an informal meeting at Saratoga, N. Y., on Wednesday morning, August 21st, 1878, to consider the feasibility and expediency of establishing an American Bar Association. The suggestion came from one of the State Bar Associations, in January last, and the undersigned have been favorably impressed by it. A body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse, might be not only a pleasant thing for those taking part in it, but of great service in helping to assimilate the laws of the different States, in extending the benefit of true reforms and in publishing the failure of unsuccessful experiments in legislation.

This circular will be sent to a few members of the Bar in each

State,—whom, it is thought, such a project might interest.

If possible, we hope you will be present on the day named at Saratoga; but, in any event, please communicate your views on the subject of the proposed organization to Simeon E. Baldwin, New Haven, Conn., who will report to the meeting the substance of the responses received.

BENJAMIN H. BRISTOW, Kentucky,
WILLIAM M. EVARTS, New York,
GEORGE HOADLY, Ohio,
HENRY HITCHCOCK, Missouri,
CARLETON HUNT, Louisiana,
RICHARD D. HUBBARD, Connecticut,
ALEXANDER R. LAWTON, Georgia,
RICHARD C. MCMURTRIE, Pennyslvania,
STANLEY MATHEWS, Ohio,
E. J. PHELPS, Vermont,
JOHN K. PORTER, New York,
LYMAN TRUMBULL, Illinois,
CHARLES R. TRAIN, Massachusetts,
J. RANDOLPH TUCKER, VIRGINIA.

Professor Baldwin, now one of the judges of the Supreme Court of Connecticut, was largely instrumental in bringing about the first meeting, has taken an active interest in the Association to the present time, and has served one term as its President.

The object of the Association is to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar. Any person is eligible to membership who has been a member in good standing of the Bar of any State for five years. The officers of the Association are: A President; one Vice-President from each State; a Secretary; a Treasurer; a Council, consisting of one member from each State, and an Executive Committee. The work of the Association is done largely through Committees as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Proceedure; on Legal Education and Admissions to the Bar; on Commercial Law; on International Law; on Publications; on Grievances.

There is a local Council for each State to which all applications for membership from that State are referred.

A few years ago the Section of Legal Education was organized,

for the discussion of methods of legal education.

Last year the Section of Patent Law was organized for the discussion of the law and practice relating to patents. These Sections meet at the same time and place with the Association but at different hours. Any member of the Association may enroll himself a member of either Section. The papers heretofore submitted to the Section of Legal Education, and the discussions upon them, have been of great value.

The first officers of the Association were: James O. Broadhead, of St. Louis, Mo., President; Edward Otis Hinkley, of Baltimore, Md., Secretary; Francis Rawle, of Philadelphia, Pa., Treasurer. The constitution provides that the same person shall not be elected President two years in succession. It has resulted that no member of the Association has held the office of President for more than a single term. The high character of the Association is shown by the names of the eminent lawyers who have been chosen to preside over its deliberations. Here is the list:

1878–79—James O. Broadhead, ..... St. Louis, Mo.
1879–80—Benjamin H. Bristow, ..... New York, New York.
1880–81—Edward J. Phelps, ..... Burlington, Vermont.
1881–82—Clarkson N. Potter, ..... New York, New York.
1882–83—Alexander R. Lawton, ..... Savannah, Georgia.
1883–84—Cortlandt Parker, ..... Newark, New Jersey.
1884–85—John W. Stevenson, ..... Covington, Kentucky.
1885–86—William Allen Butler, ..... New York, New York.
1886–87—Thomas J. Semmes, ..... New Orleans, Louisiana.
1887–88—George W. Wright, ..... Des Moines, Iowa.
1888–89—David Dudley Field, ..... New York, New York.
1889–90—Henry Hitchcock, ..... St. Louis, Mo.
1890–91—Simeon Baldwin, ..... New Haven, Connecticut.
1891–92—John F. Dillon, ..... New York, New York.
1892–93—J. Randolph Tucker, ..... Lexington, Virginia.
1893–94—Thomas M. Cooley, ..... Ann Arbor, Michigan.
1894–95—James C. Carter, ..... New York, New York.

Edward Otis Hinkley held the office of Secretary from the organization down to 1893, when he declined further service, and his son John Hinkley, the present Secretary, was elected as his successor. Francis Rawle has been its Treasurer during its whole history. Much of the success of the Association has been due to the wise, persevering and faithful work done by Mr. Hinkley and Mr. Rawle in their respective offices.

Although the Association has been in existence but seventeen years, it has already accomplished much in the line of its declared objects. The constitution provides that the President shall open each annual meeting with an address in which he shall communicate the most noteworthy changes in statute law on points of general interest made in the several States and by Congress during the preceding year. The national reputation of the gentlemen who have occupied the honorable office of President, is a sufficient guarantee that their addresses have been of great value as reviews and discussions of the new statutes and of the drift of new legislation. There has also been an annual address by some distinguished member of the profession upon an appropriate theme selected by the speaker. The subjects heretofore discussed in these addresses have been: 1879, John Marshall; 1880, Alexander Hamilton and William Paterson; 1881, Roger Brooke Taney; 1882, James Lewis Petigru and Hugh Swinton Legare; 1883, James Madison; 1884, American Institutions and Laws; 1885, An Inquiry into the Proper Mode of Trial; 1886, The Civil Law and Codification; 1887, General Corporation Laws; 1888, Codification; 1889, The Centenary of Modern Government; 1890, The Ideal and the Actual in Law; 1891, Avoidable causes of Delay and Uncertainty in our Courts; 1892, British Institutions and American Constitutions; 1893, The Distribution of Property; 1894, The American Legislature. Several briefer papers have been presented at each meeting upon important and timely questions, and a not a few of these addresses and papers have attracted the general attention of the public press and have started discussions which have lead to practical reforms. Michigan has taken an honorable position in the Association. In 1881, Thomas M. Cooley read a paper on The Recording Laws of the United States, in 1886, William P. Wells read a paper on The Dartmouth College Case and Private Corporations; in 1889, Henry B. Brown read a paper on Judicial Independence.

In 1891 Alfred Russell delivered the annual address on Avoidable Causes of Delay and Uncertainty in our Courts; in 1883 Henry B. Brown delivered the annual address on The Distribution of Property, and in 1894 Thomas M. Cooley presented the President's annual address.

The establishment of the United States Circuit Court of Appeals, and the relief afforded thereby to the Supreme Court of the United States, is perhaps the most conspicuous practical result traceable directly to work of the Association.

It will be observed that one of the declared objects of the organization is to promote uniformity of legislation throughout the Union. That object has been kept before the legislatures of the States until twenty-two States have appointed commissioners for the promotion of such uniform legislation. These commissioners from the several states have met in conference for the last three years at the same time and place with the Association, namely Saratoga Springs, in 1892; at Milwaukee in 1893; and at Saratoga Springs again in 1894. It is expected that the next conference will be held at Detroit on Monday and Tuesday preceding the meeting of the Association.

It is a high compliment that the Association has paid to Michigan in selecting Detroit over Newport for its next meeting. The Bar of the State should show its appreciation of the honor conferred, by a large attendance and an increased membership. The annual dues are but five dollars, and application for membership can be made at any time to the Local Council, consisting of A. C. Baldwin, Pontiac, Thomas J. O'Brien and Edward Taggart, of Grand Rapids, Jerome C. Knowlton, of Ann Arbor and S. M. Cutcheon, of Detroit. Members are entitled to all the publications of the Association. These publications are depositories of current legal history, and contain the best thoughts of some of the strongest men in the profession. Members in attendance receive tickets to the banquet, which is a pleasant social feature of the annual meeting.

## SOME PHASES OF JUDICIAL LIFE.

HON. EDWARD D. KINNE.

There are two or three features of judicial life which with me, have engrossed some attention. My experience upon the bench has not been varied, for I have universally, so far as was consistent with due courtesy towards my brethren on the bench, avoided an exchange of judicial labor. It is possible that each Circuit, especially in the rural districts, has its distinctive features, the existence of which may be fairly attributed to the character of the bench and the bar of that district; and one's views may, to some extent be tinged by his own individual observation and experience. The relation between the bar and the bench is one of vital interest, and of exceeding delicacy. Its character affects not alone the comfort, convenience, and prosperity of those who daily confront each other in open forum, but for good or for evil it extends its influence to the parties litigant.

When the relation is one of fair dealing, of mutual respect, of kindness, of forbearance, and of unquestioned confidence, the streams of justice flow smoothly onward towards the great ocean of right and truth. But when, whatever may be the occasion, the situation becomes strained, and indifference, absence of respect, and a want of confidence exist, transmitting their baleful influence to the court room disappointment, distress, and disaster are sure to follow, and the law is robbed of its high mission.

These strained relations may sometimes be justly charged to the bench, sometines to the bar, and at times to both.

Instances have been known where members of the profession have ascended the bench with the apparent impression that they took with them most of the truth, the candor, the intelligence, and the legal attainments of their district, and left behind them, the bar, substantially bereaved of all that was really worthy of consideration.

The genius of such a court is usually impatient, austere and arrogant. He is likely to enjoy the embarrassment of counsel, and to relish the satisfaction it may occasion the "Hoi Poloi."

The bench that abuses its privileges and authority, and allows itself to become despotic, ministers in no slight degree, to the defeat, the denial, and the degradation of law and justice.

On the other hand, I think members of the bar have been seen, who were so deeply impressed with their own attainments as to be-

come disrespectful, aggressive, insolent, and to seek forced rather than peaceful and legitimate conquests; expecting that the judge may surrender his convictions, rather than incur malicious criticism. Yet, while such conditions are unfortunate and sometimes even serious, they are not likely to be very permanent. A salutary remedy, in some irresistible form, is sure to come to the rescue of the afflicted.

There is, however, one phase of judicial life, which is the source of some annoyance, and which is confined to no district, nor to any court. It exists where concord reigns, and integrity it unquestioned. I refer to the habit of counsel, when defeated, of indulging in speculation upon the motives which governed the court in the formation of its judgment. It will be granted that the rulings of the courts of this State reflect their untrammeled opinion of the law; but their is no court in the State, so unsullied, or so supreme as to possess complete immunity from such criticism. Sometimes the alleged concealed explanation is discovered in political partisanship, sometimes in religious predilections, again in secret affiliations, and sometimes in mere friendship. Judges may err, but when they have invoked the aid of counsel and authorities, and have employed all there reasoning faculties to reach a correct conclusion, and in the clear light of their best judgement, have expounded and declared the law, uninfluenced by any consideration or thought except the discharge of a high and solemn obligation, it is peculiarly distressing to know that their motives are questioned, and their action impugned. The consciousness of pure thought and virtuous action, does not always furnish complete solace. The basis of this condition is the want of perfect confidence, and this quality may be so inherent in the very nature of humanity, as to be remediless. Mainly, however, I believe the fault lies with the bar. Many of our best equipped and most brilliant lawyers are by nature keenly suspicious. Their minds are alert, taking alarm at every obstacle or surprise, and when foiled and unsuccessful they seek for some extrinsic cause, rather than recognize principles prophetic of defeat and misfortune. Instances are not infrequent, when the the rankest injustice has thus been suffered. Undoubtedly implicit confidence is the best panacea for such conditions, and this may suggest the problem—what should be the personal relations between the bench and the bar, most likely to impress and preserve that mutual confidence, so indispensable to the success of both. Within certain lines the road is easily discerned. The bar should be considerate, respectful, candid and honest with the court.

The bench should be patient, courteous and willing to surrender its impressions, when convinced of its errors. It is not always an easy task to observe these rules. The natural infirmities of mind and body, and extraordinary and exhausting situations, must often be responsible for serious infractions of discipline and dignity.

The conduct of a judge when not on duty, has sometimes been a subject of controversy. This question must depend somewhat upon different temperaments. There are good reasons for holding that a judge should never forget his position: that around him should be a repose and a reserve, that may preclude undue familiarity and the approach of litigants and their counsel. There have been judges who regarded their conduct when not on duty, as a matter of indifference. This is a mistaken view. The public and private life of a judge are too intimately connected to admit of this dual existence. If the man in private life is impure in thought and lawless in action, his judicial career is not likely to be unblemished.

There is another phase of judicial life, perhaps more practical that has occasioned much controversy, and whose complications I fear are not on the wane. I refer to the relation of the bench to the bar during the argument of a cause, the latitude which may be allowed counsel, and the restraint which should be exercised by the court.

An unfortunate, if not a pernicious practice has grown up, fostered by reversals in the appellate court, of constantly objecting, and incessantly excepting, during the argument of a cause, until in some cases the legitimate scope and object of argumentation has been practically subverted. The right to interfere and except is not only undoubted but wise, when confined within reasonable limits; yet it is a privilege that is almost daily abused. It not unfrequently happens that counsel, feeling their cause wrecked, and destitute of merit, employ their wits to entrap the opposing counsel, into making some unguarded statement, or intemperate expression, that without explanation and its context, may seem of questionable propriety. Again counsel will enjoy the utmost latitude, freedom and even license, without comment, objection or retort, but when there follows a reply just, and by the occasion demanded, it is reported in full, and submitted as indubitable evidence of abuse and error. As a rule, it is impossible to reproduce for the benefit of the appellate court, the real drama as it occured in the lower court; and the effect and failure are often mischievous.

The profession of the law is instituted for the administration of justice. The duties of bar and bench are identical in purpose, and differ only in character. It is the true mission of both to elicit and

establish the truth, for the due application of the law.

There are certain rules, which I think all will concede to be just and obligatory upon the Nisi Prius Judge.

1. It is incumbent upon him to remain upon the bench during the argument, that he may check abuses of privilege, prevent the demonstrations of the audience, decide upon cases of dispute as to whether evidence should be rejected or admitted, correct misrepresentations of proof, repress needless scandal and gratuitous attacks upon private character, and to so admonish and control counsel that they shall not transgress the limits allowed to advocacy.

2. It is the right of suitors that their controversies should be determined solely by legitimate evidence. There is no excuse, or justification for counsel to travel outside of the record, and to seek to supply the deficiencies of their client's cause.

3. The statements of counsel, of matters prejudicial and not in evidence, should not be permitted.

4. No appeal to prejudices which are irrelevant to the issue, and foreign to the proof, should be tolerated.

5. Nor, should comment be allowed, nor argument permitted upon testimony which has been offered and excluded.

6. It is not an extraordinary occurrence to witness something of this nature—to hear counsel state to the jury "what they would have proved if permitted by the court" such practice is not only to be condemned, but it deserves punishment as contempt. It is sometimes more mischievous and dangerous than a deliberate misrepresentation of the evidence.

7. Unjust defamation of witnesses, abuse of opposing counsel, immoral allusions, indulgence in the ribald language of the street, appealing to race or religious prejudices, expressions of knowledge or belief in the guilt or innocence of the accused, are all foreign to the proper decorum of a court room, and a flagrant offence to its decency and dignity.

These are matters respecting which there can be but little room for debate.

The real trouble lies deeper. It has been well said, that the counsel represents, and is the substitute of his client. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. It is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or con-

demn motives, so far as they are developed in the evidence; to assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. His illustrations may be as various as the resources of his genius: his argumentation as full and profound as learning can make it; and, he may if he will give play to his wit or way to his imagination. So long as he keeps within the due and legitimate limitations allowed to argument his efforts should not be interrupted or restrained.

The grave and serious difficulty lies in the delicate duty of determining when the border line is approached and transgression commences. In justice to all parties, this can only be solved in the broad full light of the situation. If the Nisi Prius Courts permit infractions of these well defined regulations, they deserve and must expect review and reversal. But when the circuit judge, with a clear understanding of these principles, is alert to repress their violation, and has exercised his best judgment and discretion in a survey of the entire situation as only he can know it, an appellate court, that at best can obtain but a limited and obstructed view, may well be slow to discover that an abuse has been committed and error exists.

Unless the cardinal object of argument by counsel is to be abolished, there must be considerable latitude and freedom. In general, disputations at the bar are made without opportunity for maturity of thought, or preparation and precision in the selection and employment of language. Some allowance must be made for the zeal of counsel, the dramatic excitement of a trial, and the heat and passion engendered by earnest and vital debate.

If the men who are selected as jurors are competent to discharge their duties, it is a mistake to regard them as the prey or the mere automatons of counsel, destitute of the ordinary senses of mankind, incapable of distinguishing between right and wrong, truth and sophistry, false statements and legitimate evidence. My experience at the bar and on the bench advises me, that there is no occasion for this tender solicitude lest the jury may be misled or duped by misconduct of counsel, or that they are likely to give any more weight to mere statement or argument of counsel than it deserves. Jurors may be uneducated and mentally undisciplined, but their perceptions are quick and clear, their insight of human character keen, and they are not slow to discover the motives, the duplicity and the legerdemain of counsel. Bad faith, trickery, want of can-

dor and fair dealing, either with the jury or with the court, in the presence of the jury, usually recoil most seriously upon the author.

I venture the assertion that to-day there is scarcely an important and contested trial by well trained lawyers, that from its ashes there may not be raked some statement or action of counsel, which isolated and stripped of its environment, without explanation or context, might not present basis for criticism and review.

Court and counsel may often fail to agree in their conclusions from the evidence. Pure logic and argument, in different minds, reach opposite results, and unless the deductions of counsel are conceived in fraudulent design, and employed in bad faith, there can be no ground for interference.

Perfection even in the room of a circuit court, must not be expected, nor does it rest with the judge to direct counsel in his methods of reasoning, or insist that he shall think in his channel of thought, or adopt his principles of philosophy.

The Supreme Court of this State has well said that counsel cannot be deprived of some latitude, that while they may be uncharitable and even unjust, yet the trial court may usually be expected to do whatever is necessary to preserve order and decency; that if they were to review cases because counsel made claims from testimony that they could not recognize, they would be compelled to vacate most of the judgments that came before them for review; that the arts and appliances of counsel are permissible so long as confined within legitimate bounds; that if they were to set aside verdicts because of irrelevant remarks, they would find constant employment and be enabled to sustain but few verdicts.

It will be conceded that every flagrant abuse of established rules should be recognized and corrected; that a court room in the matter of its order, its courtesies, its discipline, its purity and its dignity should be an educating force and an exemplar to the surrounding community; but so long as the present system of jurisprudence remains, let it not be doubted that true liberty of speech is not only the right of counsel, but that it is for the advantage of the due administration of justice.

## "SHAKE-SPEARE."

### HAMILTON GAY HOWARD'S "BACON VS. SHAKSPERE; FROM THE STANDPOINT OF A LAWYER."

In a series of lectures soon to be published Mr. Hamilton Gay Howard, of the Detroit bar who has devoted a number of years' study to the subject, undertakes, in a somewhat novel way, to prove that Francis Bacon was the author of the "Shake-speare Plays." Mr. Howard argues that the author of the Plays must have been a lawyer and as William Shakspere was not a lawyer he could not have written them; and that all things show that that honor belongs to Francis Bacon. As this is a matter that no lawyer should be indifferent to a brief outline of his work may not be out of place. Mr. Howard starts out to prove, first, that the author of the "Shake-speare Plays" was a great lawyer and not a mere student of the law; second, that William Shakspere was not a lawyer, and therefore, could not, under any circumstances have been the real author of the Plays; third, that all facts point to Lord Francis Bacon, one of the greatest lawyers of the time, and the son of a great lawyer, as their author.

"The first and earliest Folio Edition of all the plays together appeared in the year 1623. This was seven years after the death of William Shakspere, of Stratford-on-Avon. This folio edition contained some seventeen plays never before published, and had been preceded by some seventy quarto editions showing many imperfections that were remedied in this edition. The latter also added much new matter by way of perfecting and elaborating the original text, and especially is this latter work shown in the use and application of the science of the law and in legal nomenclature."

After a quotation from Greenleaf's Law of Evidence in regard to the nature of internal evidence, the author says: "Why do I say a lawyer wrote the "Shake-speare Plays." It is, and long has been, generally conceded by scholars that the author of the plays was more addicted to the employment of legal nomenclature than any English writer, and that the use of law terms was not only persistent but correct."

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William Shakspere of Stratford spelt his name "Shakspere," as shown in the only signatures extant to-day. The dramas when they first appeared together in the Folio edition of 1623, were entitled and spelt: "The Plays of William Shake-speare."

To confirm his view the writer cites the opinions of a number of Shake-spearian scholars and writers; among them Franklin Fisk Heard in his work, "Shake-speare as a lawyer"; Senator Cushman K. Davis in the "Law in Shake-speare"; Lord Chief Justice Campbell, of England, Appleton Morgan, Richard Grant White, and Halliwell-Phillips. He dissects and explains the celebrated "Nash Epistle" as bearing upon the authorship of the play of Hamlet, to prove that Hamlet was written by a lawyer.

"The knowledge of the law shown in the plays is too great to have been acquired in a few months in a lawyer's office. It is perfectly evident that the author of these Plays was most profoundly learned in the science of the law, was steeped in and impregnated with the associations of his profession, and fairly bubbled over with its technical language whenever he put his pen to paper in writing them. Gerald Massey says "The worst of it for the theory of his having been an attorney's clerk is that it will not account for his insight into the law. His knowledge is not office sweepings, but ripe fruits, mature, as though he had spent his life in their growth." There are over six hundred law terms and phrases in the plays."

Mr. Howard then takes up and analyzes the law as given in the "Merchant of Venice." He reaches the following syllogism: "The case then stands thus: (1) The author of the "Shake-speare Plays" was a lawyer; (2) William Shakspere was not a lawyer; (3) Therefore, William Shakspere did not write the plays. If, however, it be claimed that Shakspere might have been a lawyer's clerk during his residence in Stratford and before he went, in his nineteenth year, to London to live as an actor and theatrical manager, these difficulties arise: (1) There is not the slightest proof of the fact: (2) There is even no tradition that points to it: (3) The author must have lived and breathed in an atmosphere of law, and he was so saturated with the law that he could hardly speak of peace or war, business or love, sorrow or pleasure, without using legal expressions, law or chancery, and these were uttered by young and old, learned and unlearned, Greeks, Romans, Italians, Frenchmen, Scotchmen and Englishmen. Recall Professor Greenleaf's exegesis."

A very significant fact is suggested by a comparison of the Hamlet of the quarto edition of the year 1603 with the Folio Edition of 1623 (seven years after the death of Shakspere), as the latter shows that part of the text was re-written to make it more correct in a *legal point of view*. I ask, is this inspiration or is it accrued legal knowledge?

Richard Grant White said; "No dramatist of the time, not even Beaumont, who was a younger son of a judge of the Common Pleas, and who, after studying in the Inns of Court, abandoned law for the drama, used legal phrases with Shakespeare's readiness and exactness. And the significance of this fact is heightened by another, that it is only to the *language of the law* that he exhibits this inclination. The phrases peculiar to other occupations serve him on rare occasions by way of description, comparison or illustration, generally when something in the scene suggests them; but *legal phrases* flow from his pen as part of his vocabulary and parcel of his thought. Genius, although it reveals general truth and facilitates all acquirement, does not impart facts nor acquaintance with general terms; how then can we account for the fact that in an age when it was the common practice for young lawyers to write plays, one playwright left upon his plays a stronger, a sharper *legal stamp* than appears upon those of any of his contemporaries, and that the characters of this stamp are those of the complicated law of real property."

Granted that the author was a lawyer and not a mere lawyer's clerk, and that Shakspere was not a lawyer, and, moreover, was not inspired from on high to especially fill the mouths of nearly all his great and small characters with law terms, legal phraseology and chancery principles, precept and practice; granted all this, why do I claim that Lord Francis Bacon wrote the so-called "Shake-speare Plays?"

First, because he was one of the few great lawyers of his day; becoming Solicitor General in 1607, nine years before the death of Shakspere and sixteen years before the appearance of the Folio edition in 1623; he was also Attorney General and Lord High Chancellor.

Second, because the writer of the plays was a thorough aristocrat, and Bacon was such, being the son of a Lord High Chancellor himself. He nowhere exhibits sympathy with democracy. His sympathies are always with aristocracy. As Walt Whitman, the modern Hebraic poet said "Shakespeare wrote chiefly of kings."

Third, because Bacon was conceded to be the best classical scholar of his day. So was the author of the plays equal in scholarship. They are full of nourishment drawn from Greek and Latin sources and many are taken almost bodily from works of authors of those nations.

Fourth, because of Bacon's knowledge of modern languages which is shown all through the plays. Othello is taken from the Italian of Cinthio's "Il Capitano Moro." The words "Who steals my purse steals trash,"

etc., were borrowed from the "Oriando Inamorato of Berni," says Grant White. Twelfth Night, The Two Gentlemen of Verona, Merchant of Venice, were all from Italian plays or novels. Italian proverbs crop out also in Lear and Love's Labor Lost. Francis Bacon was a master of the Italian language.

The writer of the plays was, therefore, unquestionably a profound scholar and a most laborious student. They could not have been written without a library, and cannot to-day be studied without one. As Goethe says "He drew a sponge over the table of human knowledge."

Mr. Howard then mentions the statute of Elizabeth which declared "all scholars of the universities of Oxford and Cambridge beggars and vagabonds." He quotes Professor Grant Allen on Sir Charles Lyell that "a great man is no unaccountable accident, no chance result of a toss up on the part of nature." Also Herbert Spencer: "the genesis of the great man depends on the long series of complex influences which have produced the race in which he appears, and the social state into which that race has slowly grown." I ask what was it that developed William Shakspere, of whom there is no proof that he ever attended school a day, and who was a butchers's appentice, horse-holder and comic actor, into the aristocrat—author of "The Plays of William Shake-speare"; and who was married, at eighteen, to a woman eight years older than himself, both of whom at that time could not sign their names to their marriage bond. How came he to preface the first play, Venus and Adonis, with a Latin motto from the Amores of Ovid?"

Says Emerson, "The Egyptian verdict of the Shakespearian societies comes to mind, that he was a jovial actor and manager. I cannot marry this fact to his verse." Nor can I.

Finally read his last will and find in it if you can, any reference to any thing but of the most ordinary, common and mercenary nature,—money, lands, bedstead, etc., but not a word about the manuscrips of the seventeen unpublished plays that appeared for the first time in the Folio edition of 1623,—those children of his brain—not a book, not even a bible.

Fifth, Bacon's parents were both eminent scholars. He was born and reared in an atmosphere of learning. He wrote a fine type-like hand. Many of his manuscrips are preserved in the British Museum. There is not a line extant from Bacon to Shakspere, or vice versa. And this between two souls who lived in the same period, who agree in every thing, yes even in errors; who would naturally seek each others society. Why the persistent and positive ignoring of each other's existence? Why is Bacon's home, St. Albans, mentioned in the plays

twenty-two times, while Stratford, not once? And why is St. Albans the central point of the historical plays?"

Sixth. The philosophy of the plays corresponds precisely with that of Bacon's recognized works.

Seventh. The politics of the plays correspond with that of Bacon; both intensely aristocratic. Both whose belong to the Essex faction. Both detested Coke and Queen Elizabeth.

Eighth. William Shakspere of Stratford died a catholic, but the writer of the plays was a protestant. So was Bacon's family. The writer opposes Papal supremacy (King John, Act 5, scene 1). He honored Cranmer, first protestant archbishop of Canterbury, the most hated of all men by catholics. (Henry VIII.) The writer was tolerant of catholics; so was Bacon. Both were free thinkers. Read Richard II, act 5, scene 5, and Bacon's "Wisdom of Ancients-Diomedes."

Ninth. If Bacon wrote the plays, why did he not acknowledge them? Halliwell-Phillips says: "The vocation of a dramatic writer was considered scarcely reputable." The legal status of actors was that of vagabonds, menials, jngglers, and buffoons. Read in Taine's History of English Literature, his description of English theatres in those days and you will not wonder why the aristocratic Bacon did not care to have his name appear as author of plays acted in them. Social ostracism awaited any nobleman at that day who earned money in any kind of trade. The gulf between nobility and common people was as wide as that between Brahmin and Pariah to-day in India. If he had acknowledged the authorship, the inference would have arisen that the burlesques and travesties of royalty in the plays, were written with deliberate intent to bring monarchy into contempt and justify the aristocracy in a revolution, which did eventually result largely from them. No! The world had not then sufficiently advanced to fully appreciate them, and so the inducement was not sufficient to acknowledge them. He left them, with his fame, to future ages."

# THE CRIMINAL LAW OF JAPAN.

TORAZO KIKUCHI.

Is is a very difficult task to present to the public a clear view of the Criminal Law of Japan. I believe no other subject concerning the Japanese codes is more difficult than this. The present criminal code of Japan is one of the most complicated of codes, based on the latest and newest principles and theories which govern the science of law in this century. However it is said that the body of criminal law in Japan was in a very incomplete condition until thirty years ago when the feudal government was overthrown and the present imperial government was re-established. I will give a short history of the law of crimes in ancient Japan.

It is impossible to trace its history in the earliest ages, for it is as old as the human race. Indeed, we know no restraining influence during the first thirteen centuries except natural law which sprung from religious idea, as ordeal, and the like. It must have been almost similar to the system of English natural law in the earliest periods which we can find in ancient history. There is no doubt but that there were several criminal courts presided over by judges appointed by the Emperors themselves. But we know nothing of what the courts consisted in and what judicial power the judges had. In the middle of the seventh century there was a great advance in the sciences, literature and the system of government, but the oppressive feature still remained that there was no regular code of law.

As soon as the Emperor Ten-chi succeeded to the throne he appointed a law committee. They embodied the laws of Japan in written form called "Omi-Richi" that is the code of Omi and this formed the beginning of Japanese written law. This was in A. D. 660. Under the dynasty of the Emperor Tenmu, in 672, a law department was established in the imperial university and ten law students were in attendance. This professional study resulted in a wonderful benefit to the ancient law.

The first idea of punishment during the first three or four centuries is said to be the holy judgment or the punishment of God. But at the time of Omi-Richi the idea was much improved, as they thought that punishment was identical with public revenge. In 715 an admirable change took place in the growth of criminal juris-

prudence. This was the idea that the crime was to be punished as an offence against the public and the public began to take cognizance of the offence. A new imperial court (corresponding to the kings' bench of England) was established and a new code was written, called "Tai-Ho-Rei." This was almost four hundred years before the Norman Conquest of England which resulted in such a progress in the laws of Europe. Though the code was corrected and several amendments were made the Tai-Ho-Rei was considered as authority for over six centuries, until the emperor lost his sovereignty and the feudal government was established under a great general. The punishments for crimes as given in the code were four:

(A.) Capital punishment, i. e., is death by decapitation.
(B.) Transportation for life.
(C.) Corporal punishment, like the Bastinado.
(D.) Imprisonment in jail.

These forms of punishments were inflicted in different ways for different classes of people. For instance a nobleman sentenced to death was not decapitated publicly, but was allowed to kill himself at his own home in the presence of certain officers. This consisted in disembowelment by means of a small dagger, which is said to be the origin of the "Harakiri," i. e. suicide, a custom famous in the old history of Japan. It seems that this peculiar system was made for the purpose of protecting the personal honor of the higher classes. The code also had a system of *Wergeld* or *compositio* for petty crimes, by paying a certain sum of money. This privilege was extended to all classes of people, similar to the ancient law of England.

Four hundred and ninety years after the Tai-Ho-Rei was written, in the first part of the twelfth century the Emperor Gotoba was stripped of his absolute control over political affairs, and General Yoritomo, the successful leader of the rebellion was placed at the head of a new feudal government. This alteration in the governmental system produced a marked effect on criminal jurisprudence. Absolute control over his own territory was given to each landlord. The relation between fiefs under different landlords was almost similar to those of England in the middle ages. The generals, landlords and governors administered the laws in their own dominions. The small organizations were developed on a like basis with the central feudal government under the great general. They formed new criminal legislation, both written and unwritten. It is extremely

difficult to present a plain outline that will distinguish between these small political units, showing their difference in regard to judicial power or jusisdiction.

During the three centuries which intervened before 1602, when a new feudal government was established by the great general Togugawa, there was no advance in criminal jurisprudence, or any of the higher sciences, for it was a gloomy war period in Japanese history. At this time the punishment of crimes was most severe, but it was only inflicted on the common people, who existed in a servile condition under the nobles and knights. However, when the Togugawa government came to power, the patriotic general paid special attention to the criminal law. He considered it his first duty to elevate the political status of his people and to promote their best interests. The accession of Togugawa VIII to the throne marks another epoch in the development of criminal jurisprudence. At his order a new code was drawn up by a committee of the ablest jurists and most competent public men of the time. Although the groundwork of the Togugawa code was constructed from the Tai-Ho-Rei, the system of courts was entirely different from that which held authority in the middle ages. The new arrangement provided that the four great centers of judicial power should be: (A.) The Supreme Court; (B.) The Court of Churches; (C.) The Court of the Mayor of Edo; (D.) The Court of Treasure. I will endeavor to show the distinctions between them.

*The Supreme Court* consisted of a minister, who was one of the members of the privy council, six judges, two prosecutors and several minor officers. The crime of treason and other high crimes, and nearly all offences of the nobles and knights called for the exercise of its authority. The court convened six times a month and it was often graced by the presence of the great general himself.

*The Court of Churches* had the usual complement of subordinate officers and the two most powerful judges in the whole judicial system held sway over it. They decided important questions involving church affairs and church territories, and in exceptional cases rendered judgment on the crimes of nobility.

*The Court of The Mayor of Edo.* The chief judge was the Mayor of Edo, capital of the feudal government. He had entire control of the political affairs of the city and judicial authority in all crimes which occured in the city limits, so that he was one of the most powerful of the government officials.

*The Court of Treasure* consisted of four judges who had terri-

torial jurisdiction in cases concerning the lands of the nobles and knights.

For three centuries the country remained at peace and these courts were very successful in the detection and punishment of criminals. The offices in the whole system were filled by faithful servants, desirous of rendering good service to the general, the government and the country. In 1868 the feudal organization disappeared and the present imperial government took its place.

This is a brief historical review of the criminal jurisprudence of Japan for twenty-six centuries. Foreigners hardly believe that the Japanese empire, rivalling now the mightest nations of the world in finance, good government, education and morals, was once feeble and disorganized as low down in the scale of civilization as Greece and Rome in their darkest days. Indeed, we who were born within the last thirty years can scarcely believe the stories of Japanese history in the feudal times, which we have from our parents and the older generations. In the study of the present law system of Japan the student will be surprised at the wonderful development, so rapid yet so systematic which has occured in the last thirty years. Hence the question arises: What is the reason for this rapid progress? I have an opinion, but it has no connection with the subject we are studying, and therefore I shall not enter into it in detail. I simply call to your attention the progress of criminal law, which has been a pleasing feature in the mighty advance towards civilization.

In 1870, three years after the imperial government was re-established, a new criminal law was written by a committee of distinguished lawyers. As may easily be imagined, it was necessarily simple and incomplete, because there had been such a complete revolution in the system of government such a short time before. In 1873, another criminal law was produced, which embodied a new idea derived in part from the law of France. As time elapsed, the study of all the sciences and professions was springing up with great force among the people. As the effect of this revival a resolution was agreed on between the government and the people, and a committee was formed under the personal direction and command of the emperor. This committee consisted of judges, prosecutors, attorneys, law professors of the Imperial University and a few foreigners who were employed as teachers in the university under the direction of the attorney general. Five years after the organization of the committee its work was completed, that is, in June, 1879. The laws they had formulated were placed before the senate and after several meetings were declared adopted April, 1880, and

signed by His Imperial Majesty.

The law consists of four volumes, twenty-one chapters, sixty-five articles and four-hundred and thirty sections. The volumes are classified as follows:

1st Volume.
1. General rule of crime.
2. " " " punishment.
3. Order of punishment.
4. Discharge, pardon, commutation and release of crime.
5. Of discharge.
6. Of pardon, commutation, and release.
7. Merger.
8. Conspiracy.
9. Intention and preparation for crime.
10. Degrees of kindred.

2nd Volume.
1. Offences against the imperial family.
2. " " " Sovereignty.
3. " " " public peace.
4. " " " public belief.
5. " " " public health.
6. " " " morals.
7. " " " dead bodies and graves.
8. " " " public industries and commerce.
9. Offence of bribery.

3rd Volume.
1. Offences against person.
2. " " property.

4th Volume. Offences against police regulations.

The crimes subject to punishment are of three classes:

(A.) Heinous crimes.
(B.) Minor crimes.
(C.) Violation of police regulations.

(A.) The punishments of heinous crimes are:

1. Capital punishment, i. e., hanging.
2. Muki-tokei; i. e., transportation for life with labor.
3. Iuki-tokei; i. e., transportation between 12 and 15 years with labor.
4. Muki-Rukei; } Same as tokei but no labor and only
5. Iuki-Rukei; } for those guilty of treason.
6. Ju-Choeki; i. e., imprisonment in jail between 9 and 11 years.

7. Ke-Choeki; i. e., imprisonment in jail between 8 and 6 years.

8. Ju-Kinko; } Same as Choeki but no labor and only
9. Ke-Kinko; } for those guilty of treason.

There are some exceptions to those punishments: (A.) A woman guilty of a crime punished by transportation will not be sent to an island but put in jail; (B.) Any person who reaches 60 years of age will not be forced to work.

(B.) The punishment of minor crimes are:

1. Ju-Kinko; i. e., imprisonment in jail for a certain number of years or days with labor.
2. Kei-Kinko; same as Ju-Kinko but no labor.
3. Fines of more than two yen.*

Anyone who will not pay fines within a month after sentence will be imprisoned, counting a day for a yen, however not more than two years.

(C.) The punishment of violation of police regulations are:

1. Imprisonment in jail of house of correction.
2. Fines from five cents to one yen and ninety-five cents.

The additional or secondary punishments are:

1. Deprivation of right of citizenship.
2. " " " to public office.
3. " " " " receive a pension, title, medal, etc.
4. " " " " honorary title or medal from a foreign government.
5. Deprivation of right to join the army.
6. " " " " testify in open court.
7. " " " " be a guardian.
8. " " " " administrator or executor in bankruptcy or under a will.
9. Deprivation of right to be a superintendent or teacher of school.

A man sentenced for heinous crime is subject to an additional punishment after his release for the period of his natural life, unless pardoned by general amnesty. But a person convicted of only a minor crime, suffers the additional punishment during the term of his imprisonment.

I have classified the law of crime in Japan as it now exists and I think that the reader must have a good understanding of the subject. It is of no use to explain in detail the punishment for each

*A silver yen is worth the same as a silver dollar.

separate crime, or the numerous theories and principles from which the body of the law has been constructed. It is sufficient to say that the law relating to the punishment of the guilty are similar to those of the United States, although difference in governmental systems and social customs cause variations in a few cases. I will state some of those differences.

*Offences against the Imperial Family.* This subject is entirely unknown in the common law rules of the United States. Yet it is the highest, most treasonable crime in Japan. Article 116 provided that any one who committed or intended to commit an action dangerous to the safety of Emperor, Empress, Crown-Prince, or any member of the Imperial family should be put to death. We will find five provisions in this article directly in opposition to the general principles of criminal law.

1. An intention of crime against the royal family is punishable by death.

2. Though the crime is not actually committed, the death punishment remains the same.

3. Though the crime be only in preparation, it is punishable by death.

4. In other crimes where the intention is punishable, it must be the intention of two or more persons united. Here it is not necessary.

5. For every variety of crime against the royal family, the only punishment is death.

It is a general principle of criminal law that for different crimes there shall be different modes of punishment but here this rule is not adhered to. This question was one of the most difficult argued by the law committee, but they resolved that an offence against the Imperial family was the greatest crime which could be perpetrated and therefore the punishment should be commesurate to the offence. Strong objections were presented against this article by scholars and professional men. They argue that death is too severe a penalty for simple preparation or intention, before the actual perpetration of the crime itself and that the punishment of the principle and agent should be different. They claimed that the Japanese idea is in direct variance with all other criminal codes. They must admit however, that it is a paramount duty with the Japanese people to protect, at whatever cost, the honor of the holy family which has held the imperial crown more than twenty-seven centuries, and ruled with an absolute sway over its people ever since the country of Japan

appeared in history.

*Offences against Morals.* The penalty for offences of this nature is more severe than in many foreign countries, because the moral idea has a powerful hold on the minds of the Japanese people.

*Offences against Religion.* The code has no division dealing directly with this subject but some offences against religion, as blasphemy, are dealt with as offence against morals. Another section of the code guards against offences similar to profanity.

*Murder.* The punishment for murder in the first degree is death, for the second degree is imprisonment for life or for a number of years. But the murder of parents or the murder of a master by a servant is always punished by the death of the criminal, while in other cases the penalty is usually transportation for life.

*Relation of Wife and Husband.* The law has no provision for the relation of wife and husband and they are always treated as principal and agent in their crimes. But in case of murder or high crime they are treated as conspirators.

*Infancy.* A child under twelve years of age is presumed to be incapable of committing a crime. Between the ages of twelve and sixteen a child is prima facie incapable of committing a crime. Some children are sent to reform-schools for a time fixed accordingly to the character of their offences.

I have traced the historical changes up to the present system of the criminal law of Japan. In conclusion I will state the number of courts in my country.

The courts of Japan are: One supreme court, seven courts of appeal, fourty-six courts of heinous crimes, fifty-three courts of state, eight-hundred and fifty-one dirtrict courts, and one or more police courts in each town or city.

There will be a great many questions to explain in connection with this subject, as to criminal procedure, criminal pleading, etc. But my purpose in this article has been to describe the ancient law of Japan and its progress to the present system; of which I believe the reader has now a fair understanding.

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## *NOTES.*

THE WAYNE COUNTY JURY LAW.—The Act to amend section five of Act No. 204, Public Acts of 1893, published in the February number of the JOURNAL, has become a law.

The Act provides that it shall be the duty of the judges of the Wayne County courts of record by special orders to be entered upon the court journal to cause examination and investigation to be made into the qualifications of all persons summoned as jurors and to direct the manner of such examination. The judge is also given the further power to summarily excuse any person whom in his opinion has not the required qualifications. This Act does not abrogate the old law but merely gives the court the authority to carry out its provisions. If this authority is properly exercised it will result in a great change for the better, as Wayne County jurors have heretofore been notoriously incompetent. It is to be regretted that the Act applies to Wayne County only, it should be made law throughout the entire State.

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THE MICHIGAN POLITICAL SCIENCE ASSOCIATION held its sixth regular meeting at Kalamazoo on February 15th and 16th. The first paper on the "Incongruity of the Divorce Laws in the United States" was read by the Hon. John C. Richberg of Chicago. Mr. Richberg is the chairman of the Illinois commission appointed for securing uniform laws between the States. In 1889 the New York Bar Association inaugurated the movement for uniform laws and twenty-two States, including Illinois and Michigan, appointed commissioners for that purpose. One of the first reforms undertaken by the various commissions was the marriage and divorce laws and consequently Mr. Richberg is well posted on that subject.

Mr. S. M. Cutcheon who contributes the article on the American Bar Association in this number is the chairman of the Michigan commission, the results of whose labors we expect to soon publish.

Prof. H. B. Hutchins, the dean-elect of the University of Michigan Law Department, read an instructive paper on "Legal Education, its Relation to the People and the State."

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CAN A MURDERER RECOVER ON A POLICY MADE PAYABLE TO HIM BY HIS VICTIM?—Whether a murderer can inherit the property of his victim has already been discussed in this Journal, *3 Mich. Law Jour.*,

*289*) but in view of the late Pope murder in Detroit, a few more words upon the subject may not be out of place. In this case it is suspected that the wife of the victim either murdered or procured the murder of her husband in order to obtain his insurance money which he had made payable to her. This precise point has never come before any American court for decision, but the English case of *Cleaver vs. Life Association, Q. B., 44 Alb. Law Jour., 382*, is practically identical. It was there held that it would be against public policy to allow the wife to take advantage of her wrong by permitting her to recover on the policies of which she was the beneficiary. This has been the uniform decision of the courts, the only exception being the case of *Schellenger v. Ransom, 59 N. W. Rep. 935* in which the Supreme Court of Nebraska held that to deny the right of a murderer to share in the inheritance of the person he kills would create an exception to the Statute of Descent. The Michigan Supreme Court has never been called upon to decide this question but we are confident that it would follow the general and correct rule. For other authorities see: *Riggs v. Palmer, 115 N. Y. 506; N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 599; Deems v. Reisinger, 28 Ohio Law J. 357; McKinnon v. Leendy, 21 Ont. App. 560.*

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RIGHT OF A TENANT TO REMOVE FIXTURES.—The Michigan Supreme Court in the case of *Fletcher vs. McMillan*, recently decided that improvements made by a tenant upon leased property for use in his business, permanently annexed to the freehold became a part of it. The premises were leased for a restaurant, the alterations to be made at the expense of the lessees. The tenant made extensive improvements removing the original partitions, sewers, and cement floor, and replaced them by others more expensive and better suited to his business. Before the expiration of his lease he attempted to remove them and the Supreme Court following the case of *O'Brien vs. Kusterer, 27 Mich. 289*, held that the articles being firmly attached to the freehold became a part of it and were not removable by him.

The right of a tenant to remove fixtures during his term has been variously decided in Michigan. Each case seems to have been governed by its particular circumstances. In fact "there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation, nor the manner of use, is in all cases conclusive. It must usually depend upon the express or implied understanding of the parties concerned." (Campbell, C. J. in *Wheeler vs. Bedell, 40 Mich. 696*). In cases where machinery has been in dispute the Court has been very liberal toward the tenant. In *Conrad vs. Saginaw Mining Co., 54 Mich. 249*, it was held "between landlord and tenant of a mining lease, an engine and boiler erected by a tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in by brick arches, and where they can be removed without material disturbance to the land, are regarded as trade fixtures, and may be removed at or before the termin-

ation of the term." See also *Scudder vs. Anderson, 54 Mich., 122*; *Bartlett vs. Haviland, 92 Ind., 552.*

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Is a Bequest for the Promotion of Free-Thought void as Opposed to Christianity?—In a recent case *Kinsley v. Kinsley XV. Can. Law Times 47* the Ontario Court of Appeal held that a bequest by which the executors were directed "to invest the residue of the estate and to apply the annual interest therefrom in such way and manner as the executors should deem expedient and proper for the promotion of free-thought and free speech in the province of Ontario," was void as opposed to Christianity. We do not believe that the courts of this country would not follow this decision. The perfect religious liberty guaranteed by the Constitution can only exist with equal liberty to disbelieve. The decision was probably based upon the principal that Christianity is part of the law of the land, this is so in the qualified sense that the law recognizes its general principles and will allow no one to maliciously revile or ridicule it. But it does not therefore follow that "one is not at liberty to dispute and argue against the truth of the Christian religion, or any accepted dogma. To forbid discussion on this subject . . . would be to abridge the liberty of speech and of the press in a point which, with many, would be regarded as most important of all" (*Cooley Const. Lim. p. 587.*) It does not appear that the bequest in question intend anything more than this. There should be perfect liberty to all to reject all religious authority, or to endeavor to promote irreligion by bona-fide argument or discussion, by doing so a person is accountable to no human tribunal.

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The Application of the Statute of Limitations to a Foreign Corporation.—The rule that the statute of limitations may be plead by a foreign corporation which does business within the State, is now almost universally established. The highest Courts of Alabama, California, Connecticut, Vermont, Illinois, Texas, and also some of the Federal Courts have held that where a company could be sued and served with process within the State, it could take advantage of the statute of limitations as a bar to any action which might be instituted against it. It is a noteworthy fact, however, that in the New York Courts the opposite rule prevails, on the ground that the foreign corporation is absent from the State and for this reason is not entitled to the immunity of the statutory plea. The opinion of the New York Court was sustained by the Supreme Court of the United States. but its opinion is not a complete affirmation, as it merely sets forth that the State Court shall construe its own statutes. But one State, Nevada, has adopted the rule governing the New York case, and courts in many of the States have passed frequent criticisms upon the New York opinion as a court precedent.

MEASURES FOR THE ESTABLISHMENT OF UNIFORM AND RIGID BAR EXAMINATIONS.—The legislature of Tennessee is now addressing itself to the consideration of a measure which should commend itself to the legislative assemblies in all the states. The measure provides for the establishment of a State Board of Examiners to regulate the admission of persons to practice law in that State. New York recently enacted a rigid law which fairly revolutionizes the heretofore existing method. The enactment of such a measure in the State of New York was not accomplished, however, without a protracted and determined struggle. It seems almost paradoxical and incredible that legislatures should antagonize a measure which aims to raise the standard among practitioners, thereby purifying and elevating the practice itself. Every one should realize the grave importance of a learned and conscientious administration of the law. Every interest of the people is more or less affected by applications of law, and all matters, civil and criminal, in which the jurisdiction of the courts is invoked, are necessarily entrused to men who are licensed by the State to expound the law. It is imperative that a crucial test be applied to those upon whom such important discretionary powers are conferred. A uniform and rigid system of examination to be prescribed by a State Board of Examiners should be enjoined upon the applicants for admission to the bar in all of the States.

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SUGAR BOUNTIES UNCONSTITUTIONAL.—The bounties to the Louisiana sugar producers have been declared unconstitutional by the United States Court of appeals, on the ground that the proceeds of taxation can only be used for public purposes and not to foster private enterprises. The suit was brought to compel Secretary Carlisle by mandamus to pay the bounties on the crop of 1894. The court held in part that the authorities cited established "beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of revenue to be deprived therefrom, for a private purpose. If it may be for the general welfare of the United States to encourage the production of sugar by grant of a bounty, it is hard to conceive why the producers of corn, wheat, cotton, wool, iron, silver, etc., might not be paid a bounty also. If Congress be conceded the power to grant subsides from the public revenues to all objects it may deem to be for the general welfare, then it follows that this discretion, like the idea that this is a government of 'delegated, limited, and enumerated powers; renders superfluous all the special delegations of power contained in the constitution, and opens a way for a flood of socialistic legislation, the specious plea for all of which has ever been the general welfare.' "

## *LEGAL MISCELLANY.*

A very concise verdict was that of a coroner's jury in Idaho: "We find that the deceased came to his death by calling Tom Watkings a liar."—*Legal Adviser*.

A New York man pleaded in his petition for divorce that "the defendant would not sew on this plaintiff's buttons, neither would she allow him to go to fires at night." The court decided that the plaintiff was entitled to a decree on the ground that his oppression was cruel and inhuman.—*Ex.*

In the Goldsmith-Clark case in the Wayne Circuit Court a rather unusual proceeding took place. The testimony of George H. Stellwagen was necessary. He was ill and could not go to Detroit. His testimony was taken over the telephone by the stenographer, and he was examined and cross-examined in the same way. There are very few instances of this method on record.

An epedemic of law and order leagues seems to be sweeping over the country. In Detroit the agitation produced by the Civic Federation has resulted in a strict enforcement of the liquor laws. The time of the average liquor dealer is about equally divided between his place of business and the police court. However Detroit's record is not yet equal to that of Louisville, where fifteen hundred warrants against liquor dealers have been issued.

Income tax returns can be filed as late as April 15th, the time having been extended by Congress to that time. Fire insurance premiums and the amounts paid for ordinary repairs will be deducted from incomes. Amounts received as dividends upon the stock of any corporation, company or association will not be included in case such dividends are also liable to the tax of 2 per cent upon the net profits. Reports of the names and salaries of employees will not be required under the law unless the collector calls for them in order to verify the returns of employes.

A remarkably full discussion of the constitutional law of the church is found in the opinion of the Oregon Supreme Court in the case of Philomath College *v.* Wyatt, 26 L. A. R. 68, which sustains the majority faction of the United Brethren in the adoption of a new constitution. The court holds that an illegal adoption of a new constitution by the General Conference, which is the highest legislative and judicial body of the church, does not destroy the identity of

the church or constitute an act of secession. A similar decision respecting this church has been made in Indiana (14 L. R. A. 518) and Pennsylvania (22 R. L. A. 161), while the Michigan court has decided to the contrary (24 L. R. A. 651).

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It may be safely said that the case of State vs. Hall in which the opinion of the Supreme Court of North Carolina was lately filed has had no paralell. Hall, standing on the North Carolina side of the line, fired and killed a man just over in Tennessee. He was tried and convicted in North Carolina. On appeal, this was reversed on the ground that, "in contemplation of law," Hall was in Tennessee when the killing was done. He was then arrested and held as a fugitive from justice. The judge below refused to discharge him. On appeal, the Supreme Court by a majority of one decides that he must be discharged because, not having been in Tennesee at the time of the killing he can not be a fugitive from justice.—*The Green Bag*.

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It is said that there are more judges in the courts of the State of New York alone than in all Great Britian, and yet the judicial work lags in that State so much that they are soon to have a considerable number of new justices added to the Supreme Court. The same condition of things may be said to exist, to a greater or less extent, in all of the States. The American practice of writing long opinions in almost every case, a vice, which few of our appellate courts are free from, is probably the chief reason for this condition of litigation, as well as for the fact that the reports of the appellate courts in this country do not, as a rule, compare favorably with those of the higher courts in England. The review of the year 1894, in the *London Law Times*, contains such expressions as these: "At the close of 1894 all the judicial business done in the House of Lords has been disposed of," and, referring to the Court of Appeal, the judges "have not allowed the sittings of the court to be interrupted for a single hour. The result is that there are absolutely no arrears of business at the close of 1894."—*Central Law Journal*.

# RECENT MICHIGAN DECISIONS

ACTION ON INSURANCE POLICY -- PLEADINGS — REPRESENTATIONS AS TO TITLE— CONTRACT AGREED TO ON SUNDAY.—In an action on an insurance policy its execution is admitted unless denied under oath in the plea, contracts dated, executed and delivered on a week day are valid though the terms were agreed upon on Sunday. Misrepresentations made by the insured as to his title to the property will vitiate such policy. *Wooliver v. Boylton Ins. Co.* (Feb. 12.)

AGENCY—AUTHORITY OF AGENT—HOW DETERMINED—PRECAUTION TO BE EXERCISED BY THIRD PARTY.—An agent's authority is not determined by the amount of business entrusted to him, but by the character and extent of the employment, as evidenced by the express authority conferred and his manner of exercising it. A third person dealing with such agent is bound to take reasonable precautions to ascertain his authority to collect and receipt for moneys, and failing to do so, is liable to the principal for any sums paid to and not accounted for by him. *Joy v. Vance.* (Feb. 12.)

ASSESSMENT OF TAXES AGAINST STOCKHOLDERS OF BANK—COLLECTION — ACTION AGAINST CASHIER.—The duty imposed upon a bank cashier, by § 33 of Act 195 of the Laws of 1893, to pay upon demand any tax assessed upon the shares of the capital stock of the bank is official, not personal. An action at law will not lie against the cashier to enforce this duty. *City of Muskegon v. Lange.* (Feb. 12.)

BANKING LAW—AUTHORITY OF CASHIER.—1. The general rule is that the authority of a cashier of a bank is a limited one and a release by him from liability upon commercial paper held by the bank, must be shown to have been authorized by the directorate or to have been acquiesced in by the bank. 2. When a cashier is allowed to exercise general authority in respect to the business of the bank for a considerable time, the bank is bound by his acts. 3. The directors of a bank are chargeable with such knowledge as reasonable and ordinary attention to the duties of the office would have disclosed. *Wing vs. Commercial and Savings Bank.* (Jan. 22, 1895.)

BANKING LAW—CERTIFICATE OF DEPOSIT—DEMAND—INTEREST.—Where a certificate of deposit stated that it would be paid upon presentation if properly indorsed together with interest for every full month if left twelve months, *held:* that no demand was necessary before instituting suit. 2. That interest could not run until demand was made or suit was brought. *Beardsley v. Webber et al.* (Feb. 12.)

BONA FIDE PURCHASER—DISCHARGE OF PRE-EXISTING DEBT.—In a replevin suit defendant showed that he had discharged a pre-existing debt as the purchase price of a stock of goods. *Held:* That such a consideration or payment for the transfer was not sufficient to defeat the title of the original vendor who set up fraud in the purchase from him. *Schloss vs. Feltus.* (Jan. 8.)

CONTRACT FOR SALE OF LAND.—A contract made by a person mentally incompetent to enter into a contract is not necessarily void. Should such contract be found to be for his interest a court of equity will protect him, and it will not be with those of whom he made the purchase to dispute his mental capacity. *McWilliams, guardian, vs. Doran.* (Jan. 22.)

CONVEYANCE OF LAND—MISREPRESENTATION AS TO TITLE—RIGHT OF GRANTEE UPON FORECLOSURE TO EQUITABLE REDUCTION.—In a purchase of land under the belief that the property contained more land than it did contain, the grantor knowing that he could not convey title to the whole property, the grantee is entitled to a proportionate deduction from a mortgage given as part of the consideration. *Rockwell v. Wells et al.* (Feb. 12.)

CRIMINAL LAW—CHANGE OF VENUE—JURORS—1. In a criminal proceeding, the people under our statute have a right to ask for change of venue. Such change is discretionary and not subject to review on error. 2. Whenever from any cause jurors shall not have been drawn or summoned to attend the Circuit Court, such court may, in its discretion, order a sufficient number to be drawn and summoned, and the court may direct from which townships or districts such jurors shall be drawn. *People v. Fuhrman.* (Jan. 22.)

CONTRACT TO CONVEY HOMESTEAD TO SON—WHEN ENFORCABLE.—In a written agreement between a father and son by which the son was to receive a portion of the father's farm and a future conveyance of the balance, *held*, such agreement so far as it related to the homestead was null and void, but though indefinite and uncertain in its terms will be enforced in equity as to the separate parcel, the son having fulfilled his part of the agreement. *Engle v. White.* (Feb. 12.)

CRIMINAL LAW—ADULTERY—COMPLAINT BY AGGRIEVED HUSBAND.—Under How., Stats., § 9279, a prosecution for adultery may be instituted on complaint of the husband of the woman with whom it was committed. *Wilson v. Gratiot Cir. Judge.*

DAM, MAINTENANCE—PRESCRIPTIVE RIGHT TO FLOWAGE.—Where the height of a dam has been established and maintained for over fifteen years, a prescriptive right to flowage at that height has been acquired. *Williams v. Barber.* (Feb. 12.)

FIREMAN'S RELIEF FUND ASSOCIATION—MEMBERSHIP NOT TERMINATED BY ACT OF FIRE COMMISSIONERS.—REFUSAL OF TRUSTEE TO ACT.—The right to relief from the Detroit Firemen's Association fund, upon the death of a member in good standing, vests in his wife and children. The Board of Commissioners cannot, by retiring and placing a fireman on the pension list, terminate his membership in such association. The refusal of a trustee to act cannot defeat the right of recovery, as the suit need not be brought in his name, nor would the defendant be liable in a second suit instituted by him. *Nevell v. Detroit Fireman's Association.* (Feb. 12.)

INDORSER OF NOTE WHEN JOINT MAKER—SERVICE UPON NON-RESIDENT.—When a third person endorsed a note before delivery he is liable as a joint maker. In an action on such note service can be had under § 7316, How., Stats., upon such indorser though outside of the county in which suit is brought, after service upon one of the joint makers within that county. Evidence must exist in the Clerk's office of due personal service in the county where suit was commenced before service upon any one in another county. *Allison v. Washtenaw Cir. Judge.* (Feb. 12.)

LANDLORD AND TENANT — NON-USER OF LEASED PREMISES — RESTRICTION OF FORFEITURE CLAUSES.—A tenant's removal from leased premises with the expressed intention of returning to remove crops is not an abandonment of his right to the crops nor a surrender of the lease. Abandonment includes not only the intention to abandon but also an external act by which the intention is carried out. In a releasing of premises subject to the terms of the original lease, a provision relating to reentry cannot be held to apply to implied covenants but only in case of default respecting express promises. *Hough v. Brown.* (Feb. 12.)

LANDLORD AND TENANT—ACCEPTANCE BY LANDLORD OF PARTIAL PAYMENT OF RENT AFTER NOTICE TO QUIT.—Where a Landlord after notice to quit accepts part payment of the rent due, he recognizes the right of the tenant to occupy the premises for at least the time such payments covers. *Barber v. Stone.* (Feb. 12.)

PARTNERSHIP—CONTRACT MADE BY PARTNER.—In an action by a partnership on a contract made by one of the firm it is not necessary to show that the parties were co-partners or that it was so understood by the parties. A partner in making a contract acts as agent of the partnership and suit may be brought in the firm name *Phillpott v. Bechtel.* (Feb. 12.)

RAILWAY COMPANY—EMPLOYEE ASSUMING RISKS—FELLOW SERVANTS. — Where an employee of a railroad company performs acts in a manner not required by the rules of the company he assumes the consequences of such acts. The company is not liable for injuries of a brakeman caused by ashes dumped upon a track by a fireman and not removed by the section men, they being his fellow servants. *Loranger v. Lake Shore & M. S. Ry. Co.* (Feb 12.)

RAILROAD COMPANY — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE.—"A" while riding upon one of defendant's trains, refused to pay his fare, and being threatened with arrest, jumped off and was killed. *Held:* That the act was so reckless as to amount to contributory negligence, and that the conductor's statement that he would cause his arrest cannot be construed to have been the proximate cause of the injury. *Burden, Admin. v. Lake Shore & M. S. Ry. Co.* (Feb. 12.)

# BOOK REVIEWS.

ANDREWS' STEPHEN'S PLEADING.—A treatise on the Principles of Pleading in Civil Actions comprising a summary view of the whole proceedings in a suit at law by Henry John Stevens, Esq., Barrister at Law, edited by JAMES DE WITT ANDREWS. Callaghan & Co. One vol., 8 vo., 600 pp. $4.00 net.

The appearance of a new edition of a standard work is always of interest. Some new editions of standard works would better have never been written because in them the old text and the analysis of the subject are changed and deformed without any compensation advantages. This, however, is by no means the case with this edition of Stephen's Pleading; in it the original text is preserved intact. This can be done better in Stephen's work than in any other on that subject as in it the principles of pleading and its necessary elements are given, rather than any enumeration or explanation of mere rules or particular forms of action. Thus it can be used with equal advantage in both code and common law States. For although the codes may succeed in abolishing particular actions and may change procedure, they can never destroy the principles which underlie all pleading.

The notes which bear the evidence of careful preparation are very full and complete and show the modern application of the text. The authorities have been taken from the best and latest American and English cases and form quite a digest on the points they refer to. The chapters added by Mr. Andrews on the Joinder of Parties and the Election of Remedies greatly increase the value of the book and render it most complete. This edition is thoroughly up to date, and is a decided improvement upon any former edition.

BRADNER ON EVIDENCE.—A comprehensive work on the rules of Evidence as prescribed by the Common Law for the trial of actions and proceedings. By GEORGE W. BRADNER, of the New York Bar. Chicago, Callaghan & Co. One vol. 8 vo., 580 pp. $5.00 net.

Following the arrangement of Stephen this book brings down to date the rules of evidence as modified by the late cases. It is of value to the student in its clearness of statement and its citation of the latest decisions, and its value to the pratitioner rests on about the same grounds. In the works on this subject which are now considered standards, notably in Greenleaf on Evidence, there are instances in which judicial construction has greatly modified the text. In some few points the changes have been so great and their recognition by the courts so general that a work such as this, becomes of great value since it saves to a great extent the examination of many cases on the points which have been modified or superseded.

The book is intended by its author to supplement such works as Greenleaf, Stephen and Taylor by its special attention to the changes in the law which have gradually but surely taken place. As such it is a

decided success and its value is sure to be recognized by all. As a text-book it is clearer and more satisfactory than most others since it gives the student the rules as they now are as simply and concisely as possible.

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BLACK'S CONSTITUTIONAL LAW.—Handbook of American Constitutional Law. By HENRY CAMPBELL BLACK, M. A. Author of Black's Law Dictionary, and of Treatises on Judgments, Tax Titles, Constitutional Prohibitions, etc. St. Paul: West Publishing Co. One vol., 8 vo., 627 pp. $3.75.

The promises made by the publishers of the "Hornbook Series," are being rapidly fulfilled. They started out with the avowed intention of furnishing a series of reputable elementary treatises on all the principal subjects of the law at a uniformly low price. They are not only fulfilling their promises, but they are doing so in a manner highly satisfactory to their patrons. Each new volume added to the series has some points of superiority over its predecessor. This fifth volume is perhaps the most interestingly written of them all. It is essentially a student's book. But as to the subject of constitutional law there are comparatively few lawyers who need not still consider themselves students. The author begins with a chapter devoted to definitions and general principles. The relation of the United States to the States is next taken up, followed by two important chapters upon establishment and amendment, and upon constructions. In the next dozen chapters are treated in more or less detail, the powers of the constituent parts of the government, including the federal executive, federal jurisdiction and powers of congress; the executive, legislative and judicial powers in the states, and the police power, taxation, eminent domain, and municipal corporations. The closing chapters treat of civil rights and their protection by the constitution, political and public rights, constitutional guaranties in criminal cases, laws impairing the obligation of contracts and retroactive laws. The book is written in a popular manner and one's interest in it increases as he reads.

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FETTER ON EQUITY.—Handbook of Equity Jurisprudence. By NORMAN FETTER. St. Paul: West Publishing Co. One vol. 8 vo. 463 pp. $3.75.

This is volume six of the "Hornbook Series", and following quickly upon the heels of the preceding volume is an evidence of the hustling facilities of the publishers. We have had occasion to say something heretofore concerning this series of law books. In typographical appearance and mechanical construction they are similar; and to the credit of the publishers be it said, uniformly excellent. The author of this volume has assumed the task of treating one of the most difficult subjects. Never having chanced to see or hear of any other legal work by this author, we assume that this is his first. This presumption is borne out by the fact that the title page of this book is not embellished with any list of works of which he is credited as being the author. He has furthermore prepared this work with the precision and accuracy of

one whose reputation depended in a great measure upon the favor with which it was received. While it certainly shows the evidences of great care in its preparation, the whole field having evidently been carefully gone over, it will probably not have a very wide sale among practicing lawyers. It is too short and abbreviated to suit their demands. They want something more exhaustive and which treats technical points more fully. In this book there are but. 335 pages of text, nearly 100 pages being taken up by a table of cases arranged in single columns. It may be that for the purposes for which the work is primarily intended this brevity is a merit rather than a fault. The student can certainly get a very clear conception of the elementary principles of the whole subject by the careful study of it. As an index and aid to a more thorough study and knowledge of the subject it will be found of great service.

## *CURRENT LITERATURE.*

*Littell's Living Age* for the week beginning March 2nd, describes "The Court of Ferara in the Fifteenth Century." "Only Kitty" is contributed by L. B. Walford. There is an excellent article on "Oliver Wendell Holmes"; and one on "Christine Rossetti." A good paper on "Chemical Powers of Minute Sea Creatures," is taken from Cosmos.

*The Illustrated American* for the week ending February 23rd, was very appropriately a Washington Birthday number. The frontispiece represented "Houdon modeling the famous bust of Washington." The other illustrations, notably that of "Washington and his Generals," were excellent. In that number *The Illustrated American* completed the fifth year of its existence.

*The American Magazine of Civics* for March presents a varied list of timely and well written articles. Among them are: "Shall we look Backward or forward in Dealing with the Criminal," by Henry Smith Williams; "Money," by James A. Quarles; "Socialism and a Municipal Commonwealth," by Lemuel C, Barnes; "Do the Victors own the Spoils," by Ellis Biddle Reeves; "Energy of Legislation," by Edward P. Powell; "Canada's Future, as seen by Canadians," by Helen Gregory-Flesher; "Education of the Farmer," by Samuel James Logan; "The Single Tax: A Reply," by R. W. Joslyn.

*The Review of Reviews* for March, in accordance with its custom, discusses the work of the various state legislatures, thirty-three of which were in session during January and February. The *Reviews* article gives the results of recent correspondence with officers and members of these legislative bodies in all parts of the country. thus forming a unique contribution to current political information. Besides this there are various special features including a character sketch of the Italian Premier Francisco Crispi, and another of the late Lord Randolph Churchill. The illustrated article on the "Electric Street Railways in Budapest" show, what few Americans would suspect, that the Hungarians are adopting and improving upon our electric railway systems.

The *Atlantic Monthly* for March contains the opening chapters of a striking serial entitled, The Seats of the mighty, by Gilbert Parker. It deals with the life and adventures of a young captain in a Virginia regiment, afterwards of Amherst's regiment at the time of the fall of Quebec. It will run through several numbers, and is one of this popular author's most powerful stories. Fiction is further represented by the first installment of a two-part story by Grace Howard Pierce, entitled Gridou's Pity, and additional chapters from Mrs. Ward's serial, A Singular Life.

Every one who is interested in antislavery literature, or who has read Neighbor Jackwood and Cudjo's Cave, will be glad to read Some Confessions of a Novel-Writer, by John T. Trowbridge, the gifted author of these remarkable stories.

Two papers of importance are Immigration and Naturalization, by H. Sidney Everett, and the second of Mr. J. M. Ludlow's papers, Some Words on the Ethics of Co-operative Production.

The educational paper of the issue is by Professor N. S. Shaler, who treats of The Direction of Education, Another delightful bit of Sicilian travel and description, by Elizabeth Pullen, is Bova Unvisited.

Aside from these features there are poems by Bliss Carman, Clinton Scollard, and Madison Cawein. The book reviews will appeal especially to the lover of poetry, as there is an exhaustive review of current verse: The usual departments complete the issue.

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*The Forum* for March contains a very interesting article on the Justice of the Income Tax, by Professor E. R. A. Seligman, of Columbia College of which the following is a brief excerpt. From the legal point of view can it be seriously maintained that a thousand dollar exemption from the general property tax or a ten thousand dollar exemption from the inheritance tax is constitutional, but that a four thousand dollar exemption from the income tax is unconstitutional? If this provision in the income tax law is unconstitutional, then we must overturn hundreds of decisions in our State tribunals, and completely reverse the general tendency of fiscal development throughout the civilized world. We must say that uniformity means absolute uniformity, and declare unconstitutional hundreds of existing laws which aim merely at substantial uniformity. There is, therefore, very little prospect of the tax being declared unconstitutional on that ground. This brings us to the question whether the income tax is indeed a just measure. Some people say it is socialistic, and that the state has no right to confiscate earnings. This objection scarcely deserves a refutation. It entirely misconceives the relations of the individual to the state. The cry of Socialism has always been the last refuge of those who wish to clog the wheels of social progress or to prevent the abolition of long-continued abuses. The Factory Laws were in their time dubbed socialistic. Compulsory education and the public post-office system were called socialistic. There is scarcely a single tax which has ever been introduced, which has not somewhere or other met with the same objection. This is true no less of the new inheritance tax in some of our commonwealths and in England than of the new property tax in Holland and Prussia. But the argument nowhere carried any weight. In fact, if there is any Socialism, it would be far more obvious in the property tax, which exempts the earnings of the poorer classes, than of the income tax which reaches earnings from other sources than mere property. Yet we have become so accustomed to the property tax that the idea of its being socialistic seems ridiculous.

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## "LEGAL VERBIAGE."

HENRY A. CHANEY.*

"Verbiage" was what Chief Justice Graves used to call the phraseology of a pleading, and ostensibly he meant no harm by the word, but those who know the subtle humor of that eminent judge are likely to suspect that this felicitous term was critical as well as descriptive. He used it as if it simply signified the wording, and that in strictness is, no doubt, its meaning—otherwise Bishop Warburton was a little redundant when he wrote of "matter * * * cleared from the perplexity of the abounding verbiage;" the idea of over-abundance is nevertheless an inseparable element in the present understanding of it. It is the chief feature in what Jeremy Bentham was accustomed to denounce with inappeasable rancor as "the lawyer's dialect"—alias, the flash language. He insisted that in the whole field of law there was not an idea that could not be expressed by words in familiar use, yet pleadings, he said, were made incomprehensible by the lies which they were required to contain. A declaration against a debtor, for instance, would state that he had faithfully promised to pay when he had not only done no such thing, but, in fact, had flatly refused to pay. If suit were brought to recover possession of personal property, no matter how cumbersome—the Eiffel tower, for example, or the Ferris wheel—the plaintiff would assert that, having been possessed of it, he had casually lost it, and the other party had found it—as he might a package. The action in the first case is called assumpsit, which, as every Latin student will know, means "he promised"—so that even the name of the most common form of action in use springs from a pure fiction in pleading. In the other case the name of the action is trover, which is law-French for find-

*Written shortly before Mr. Chaney's death and not hitherto published in the Journal.

ing, though it is probably not the fact, one time in ten thousand, that either party either lost or found the object of the suit in any common acceptation of those terms.

How the system which preserves these absurdities came into England, whence it survived to the United States and still survives where codes of procedure do not prevail, is explained by Bentham, who says that although language was the same in the numerous Saxon local judicatories, whether people appeared in their own causes or lawyers appeared for them, there grew up under the Norman Kings, lawyers, Normandy-bred, who spoke a sort of French, and whose rules of procedure, such as they were and so far as they remembered them, would be such as their own language gave expression to, but were unintelligible to most suitors. The Westminister Review adds that the Norman fell into disuse, but that a jargon survives which is scarcely less unintelligible. And as if he could find no word himself in everyday English injurious enough to do justice to this jargon, Bentham called it, as Tooke did also, in his Diversions of Purley, "the grimgribber of Westminister Hall." Tooke, however, had lost a case on a point so technical that it is no wonder he lost his temper as well; he said he had been made the victim of two prepositions and a conjunction. As for Bentham, he wrote, of course, with all the fury of a reformer. But one can hardly help being in sympathy with him when he declares for plain language. The readers of Mr. Payn's admirable story of "The Canon's Ward" will remember the open derision with which the novelist handles that honored phrase in equity procedure—the cestui que trust—and how he makes the mild old canon revert continually to the remarkable fact that his ward's little girl should support a legal existence under so barbarous a designation as that which he insisted—and correctly—upon calling "The Settiky Trust." The cestui que use is a first cousin of this. One would think the resources of Shakspeare's tongue might be equal to furnishing an understandible substitute for such patois as this—especially when it comes to pluralizing them into cestui que trustent and cestui que usent. Mr. Payn is not the only maker of fiction who has had his gibe at professional lingo; Mr. Reade represents the hero of "Very Hard Cash" as remarking that deeds are written in an unknown tongue called "Lawyerish," where the sense is as one grain of wheat in two bushels of chaff; he says that the moment he saw what a senseless rigmarole the document in question was he insisted that the battological author should furnish him with an English translation, which he did; "the crib occupies

just twenty lines; the original three folio pages." And yet Mr. Reade had a soft side for lawyers and an appreciation of the law.

Notwithstanding Bentham and the jokes of the novelists, it should be remembered that the practice of law is an old business, and that the forms and phrases of practice had become pretty well settled long before the English language had itself become intelligible; many ancient phrases have disappeared as it is, and most of them that remain, though more or less pedantic, are not especially inconvenient. Some phrases, still kept in use by punctilious or inexperienced pleaders have often their English equivalents substituted for them by those who care more for sense than style. Such terms, for instance, as autrefois acquit or convict are quite as commonly replaced by "former acquittal" or "conviction." The disposition to use a resonant expression has something to do with the retention of old forms; this is true of all forms of composition. A long word, or an unusual one, has great charms. And the bare English meaning of a foreign phrase is often so ridiculously simple that one is reluctant to expose the poverty of it by putting it into the vernacular. Trespass quare clausum fregit is far more imposing than trespass "wherefore did he break into the inclosure." The writ of ne exeat regno, which is said to be impending over a recent diplomatic appointee who has neglected to account with his partner, is much to be preferred to the commonplace "don't let him go out of the kingdom." The formal plea to an action for dower used to be tout temps prist or tous jours prist, which simply signified that the defendant was "all the time ready" or "every day ready" to pay over the dower. The writ of quare impedit meant only "why does he hinder" a patron from presenting to a benefice; that of quo warranto against a person in office is merely to require him to show "by what warrant" he holds it. The principal writs, indeed, like the prayers and penitential psalms in the liturgy take their names from some significant word or phrase. For instance, the Latin version of a mandamus conveys a mandate in the words "we command;" the writ of habeas corpus requires the sheriff "to have the body" of So-and-So before the court; the writ of certiorari, or of "sashy rarey," as the old-time rural lawyers were wont to call it, directs the lower court "to certify" certain proceedings to the court that issues it—to make it certain, i. e., to inform it; the writ of fieri facias directs the sheriff, in executing a judgment to "cause to be made" the amount of such judgment from the defendant's goods. The meaning of the terms are simple enough, but it would puzzle any one to substitute for them now any

compact English equivalent that would convey precisely the same idea.

But why should counsel, in addressing a court, say that there is one question which he wishes to touch upon in limine? Why not say "on the threshold" and be done with it—or, better still, state his question and proceed? And why say that inter alia he wishes to discuss such and such questions, instead of saying that "among other things" he wants to ask attention to these? "Among other things" is precisely what inter alia means; no less and no more. It may seem a little more respectful to a court to call an expression of its opinion upon a point not in the case an obiter dictum, but it is none the less "something said by the way." The late venerable and learned Justice Bradley was nicknamed "Aliunde Joe," because of the doctrine—not by any means new, for which he gave the casting vote in the electoral commission that evidence of the vote of a state could not be received from other sources than the governor's certificate of election, and aliunde was the word he used in his opinion to express the idea. He could not have used a briefer term, nor a more accurate. But actus Dei and vis major are no better than their English renderings, and are passing into disuse.

Wholesale changes in phraseology are not to be expected, nor are they desirable. If they were attempted they would be as ephemeral, probably, as the fastastic chronology of the French revolutionists and the names they bestowed upon the months. It is the way of the world to let well enough alone, and if set forms of words are reasonable, it is generally convenient that they should be retained. A dozen years ago Prof. Melville M. Bigelow, of the Boston Law School, and, by the way, a University of Michigan man of the class of '66, spent a summer in London, during which he collected, under the name of "Placita Anglo-Normannica," the reports of the earliest cases in English jurisprudence since the conquest; his volume is the first in the long series of reported English cases. It is interesting to see in the law Latin of the time the equivalents of phrases which every practitioner still uses—such as praedictis—"aforesaid"—qui venerunt cum praedictis conquestore—"who came with the conqueror aforesaid"—diversas terras—"diverse lands"—et hoc parati fuerint probare—"and this they would be ready to prove." Such expressions as these were hardened into set forms, and some of them were abbreviated in the Year Books, and in such works as Chitty's Pleadings are represented merely by an "&c." The abrupt expression "prist &c.," which constantly appears in the Year Books, often several times in the same case, is supposed to rep-

resent the Latin phrase last above quoted, prist being law-French for "ready."

Coke upon Littleton, a great work rarely found upon the shelves of a lawyer's library unless he is also a scholar, makes an especial point of giving not only the definitions, but the origin of words. "Denizen," for instance, is one that is deins nee or "born within" the limits in question; "attorney" is one who appears in the turn of another, so that the phrase "turney-at-law," as has been written by an illiterate person, is not very far out of the way; "bail" is from an old Saxon word, baily, meaning safekeeper or protector; "sheriff" is the shire reeve—shire coming from the Saxon scyran, to divide—being the political division of the country—and reeve being the Saxon Gerefa, gereve, greve—one placed over; "estate" is from the Latin statum—which stands; and "fee" is from the French fief; "rent" is from the Latin reddere, to return, and "escrow" is apparently from the word scrowl or scroll, a writing; "subpoena" is a notification to appear "under pain,"—punishment or penalty—for failure to do so; subpoena duces tecum is a similar order to "bring with you" whatever writings or exhibits are called for.

From such scattering definitions as these, which are but samples, one may obtain an idea of the rationale of legal phraseology, which after all is like the rationale of everything else and may more or less easily be reduced to comparative simplicity.

# INDETERMINATE SENTENCES.

HON. GEORGE M. BUCK.

The subject which gives its title to this paper cannot be profitably considered solely from the point of view of the sentimentalist, the philanthropist or the sociologist but must be regarded from the standpoint of plain, practical common sense. Nevertheless a practical, common sense view of the subject cannot be obtained if we disregard feelings of sentiment, the claims of humanity or the welfare of society. Reproach is cast upon the law, the fair name of justice is aspersed whenever it is taught by word or example that the administration of the law is a matter of the head only and in no way concerns the sentiments, the emotions, the sympathies of the human heart. We, the judge on the bench, the jury in their box, the advocates at the bar, the spectators in the court room and the trembling criminal in the dock are all children of one common Father; and this relationship of every human being to every other human being is something more than a figure of speech, more than a mere sentiment; it is a living, commanding, controlling fact, a fact which, whether we recognize it or ignore it, will continue to exist, to exert its influence on the race, and to determine in no small degree the destinies of mankind as long as humanity endures. And because this is so, the conduct of organized society—which we call the state—toward those who disobey the laws of the state, must ever be a matter calling for the broadest philanthropy and the highest regard for the welfare of society, combined with the greatest practical wisdom. Any system or scheme for the punishment of criminals which has regard only to the protection of society and which takes no account of the welfare of the criminal must in the very nature of things be inhuman and wicked; while too great tenderness for the individual and too little care for the protection of society is not only in the highest degree unwise, but is also downright cruelty to the innocent, law-abiding members of society who are left without adequate protection from the assaults of the vicious; and society itself cannot long endure unless it affords ample protection to the humblest and feeblest member of the community. As Gibbon well observes in his matchless work on the rise, decline and fall of the Roman empire, "A sin, a vice, a crime are the objects of theology, ethics and jurisprudence. Whenever their judgments agree, they corroborate each other; but as often as they differ, a

prudent legislature appreciates the guilt and punishment according to the measure of social injury."

All this is trite enough, but we need to have our attention sharply called to these primal principles which underlie all social and political organization if we would have a clear conception of the matter of the prevention and punishment of crime.

Now, it may seem to be unbecoming for one who is an administrator of the law to find fault with the law which it is his duty to administer, and it may seem to be presumptuous in any one to criticise a system which has been in vogue for so long a time as the present method of punishing criminals by imprisonment for a stated, fixed and determinate period. But I want to suggest, with all due deference to the wisdom of the law-makers who have given and continued this method for ages past, whether there is not much room for grave doubt whether this method is not so wanting in justice, so inadequate and ineffectual in its results as to call for a very decided modification. And I shall refer to a few of the imperfections of the present system before discussing the remedy which, in my judgment, ought to be adopted.

In the first place, the sentencing of criminals for a fixed time works inequality and is thereby inequitable. "Equality is equity" in the administration of the criminal law as well as in the decision of chancery causes. But this equality can not be secured, nor can there be anything approaching equality under the present system. It must be remembered that infractions of the law amounting to crimes are as various as other events in human history and there can be no such thing as two offences which are precisely alike or very nearly alike. We have very convenient divisions of crimes into offences against the state, offences against life, offences against the person, offences against property, offences against public justice, offences against public peace, offences against chastity, offences against the public health, and various other titles too numerous to recite, and these we divide and subdivide almost endlessly, but no two offences named in any division or subdivision can be alike; for who does not know that no two murders, for instance, which were ever committed, were or could have been exactly alike in their circumstances or incidents. So that in considering the grade of offence, where can we find scales of justice of such fine poise as to indicate with anything like certainty the degree of atrocity involved in the act itself? It is evident from the very statement of this question that the utmost obtainable information must leave much unknown that ought to be known, and that the court in investigating the circumstances under which a crime was committed must often grope in the dark in a vain quest for

facts which, if known, would have great weight on the side of severity or of mercy.

But when all the facts and circumstances attending the commission of the offence have been learned so far as possible, the difficulties in the way of pronouncing a just judgment have only begun to make their appearance. It must be conceded, I think, by all who have made the matter of crime and punishment the subject of thought, that all the woes and evils pronounced by law against criminals, have one main object in view: namely, the protection of society by the prevention of crime, and this in three different ways: First, by reforming the offender.

Second, by putting it for a time at least, out of the power of one who has committed a crime to commit other crimes, and

Third, by deterring others from committing crime for fear of the penalty. But the idea of punishment as a means of inflicting pain or suffering on the criminal has no place in the law. The law is as incapable of enmity, retaliation or revenge as it is of sympathy. Hatred, malice, vindictiveness have no more place in the heart of society than in the mind of God. And so it is or should be recognized as a truth in penology that the first and chief object of punishment is the reformation of the offender and that the other two objects which have been stated, though not to be lost sight of, are still of less importance than the one first named. But in order that the offender may be induced to reform, in order that the deprivation of his liberty may be for such a period as to justify an expectation that society will be henceforth free from assaults by him, and in order that the punishment inflicted on him may have a salutary effect on others, the one who prescribes the limit of incarceration should have an accurate knowledge of the history of the offender in all its details, his birth, parentage, education, environments, life. But these are the very things which, in nine cases out of ten, the judge who pronounces the sentence does not know and cannot know. In this regard the most usual criminal cases may be thus described: A crime against property has been committed. The criminal has been arrested and pleads guilty or is tried and convicted. He is a stranger in the neighborhood where he is condemned. The judge appeals to the prosecuting attorney, but that officer, however zealous and efficient he may be, can learn nothing of the man's history and the sheriff is equally ignorant. The offender upon being interrogated tells a smooth story of greater or less plausibility which, if true, would make him a fit subject for judicial clemency, but which, if not true, shows the culprit a be a hardened, lying villain. To disbelieve his story might be to do a gross injustice and harden the heart of the

offender past all hope of reformation; to believe it might be to make the way of the transgressor easy instead of hard and to lead him to conclude that continuance in crime is better—all things considered—than to abandon his vicious course. What can the judge do? He is but human, fallible, and however wise and shrewd he may be he is a being of limited knowledge and limited judgment, liable to make mistakes, and a mistake at this point must be fraught with consequences which will be disastrous alike to the criminal and to society. A single incident from the experience of the writer will illustrate this part of the subject. Two men were arrested for burglary. According to their story, corroborated by the officers who made the arrest, there was a third person who though concerned in the crime had escaped arrest. The two who were caught were honest looking, apparently candid young men, with hands hardened by toil, and with nothing in their words or demeanor which betokened habitual criminals. Their story was a straight-forward one and a separate examination and cross-examination failed to reveal any flaws in it. According to their story, briefly told, they were honest, rural workingmen, coming from different states and meeting by accident in the city and had there fallen in with a stranger and by him plied with drink and while in that state were easily led into assisting in the burglary. Testimonials from men apparently of intelligence and veracity supported their story which was further corroborated by facts learned by the officers. With some reluctance and not a little misgiving a light sentence was pronounced in the case of each, and within a week thereafter it was learned by accident that the men were professional criminals who had each served time more than once in different prisons for short terms, escaping a long term each time through testimonials prepared by confederates and that the calloused condition of their hands was the result of toil in the workshops of the prisons from which they had recently been discharged.

But it would be impossible in a paper of much greater length than this can properly be, to mention one half the glaring defects in the system of determinate sentences, defects which are, I think, apparent to every judge of the circuit courts of this state. So that these other imperfections although quite as serious as any which have been mentioned, must pass unnoticed so far as this paper is concerned in order to afford space for a suggestion of that which the writer believes would do away with many if not the greater number of the elements of uncertainty, injustice and failure in the present method of dealing with criminals. This suggestion is not by any

means a new one, as the title of this paper shows. The plan of imposing an indeterminate sentence in most cases of conviction of crime would, it seems to me, be so great an improvement on the present method as to be worthy of at least a partial adoption. I say "in most cases" because in the opinion of the writer, there are crimes against the person of individuals, of such peculiar and marked wickedness that he who commits such a crime ought to know in advance of its perpetration that for him the bars of the prison and the door of hope will never unclose during his life save by the clemency of the chief executive of the state. But as to other offences, the punishment ought to be based on the theory before stated, namely, that the correction is for the reformation of the offender, and instead of the sentence of imprisonment being for a fixed period let it be until the offender shall be discharged according to law, and let the law be so framed that when he has reformed and not until then he may be finally and absolutely discharged from imprisonment, surveillance, and the fear of further punishment. To this end the law should provide that upon sentence being pronounced in any case of felony whenever such sentence shall be to imprisonment at Jackson, Ionia or Marquette, or (in case of women) at the House of Correction in Detroit, a statement and history of the case, so far as known, shall be sent by the clerk of the court to the board of control of prisons and also to the advisory board in the matter of pardons, and that it shall be the duty of the former board to investigate fully the past history of the prisoner, his place of birth, his parentage, education, conduct, in short everything which could throw light on the question of the degree of criminality involved in the offence, all these to be made a matter of record. Then at any time after a certain minimum and not later than a certain maximum period of time, on the recommendation of the board of control or by order of the circuit judge without such recommendation, let the prisoner be brought before the court in which he was sentenced and his case fully inquired into and such order made therein as justice may require. If he has fully reformed let him be discharged; if he has not let him be remanded; if the matter is in doubt let him be released, either with or without bail, to appear at a fixed time to be further dealt with according to his behavior in the mean time. In short let the hand of the law remain upon him until he shows by his conduct that he can be trusted again with all the privileges that belong to other members of society. And during the whole period of his probation beginning with his sentence and ending with his

final discharge, let him be under the restraining, encouraging, helpful observation not only of the board of control but of the court as well. In this way the judge could deal with the case understandingly and in the light of a complete history of the individual who is the subject of correction and restraint. Some provisions ought to be made for the final discharge of the prisoner at the end of a specified term of years, so that one could not be imprisoned for life for simple larceny, but this term should be so very long that the mere possibility of so great a period of imprisonment would be continually before the eyes of the criminal during the whole time that he is under restraint and operate as a wholesome deterrent to those who might be disposed to enter upon a course of crime. This may seem a hard course of treatment, but in the practical working of this system it would bear hard on none but persistent, habitual criminals. The writer was once called upon to pass sentence on a man sixty years of age, who, according to his own statement, had been in prison over forty years in all, the result of ten or more convictions and under sentences not one of which was for more than ten years. Why should the state be put to the trouble and expense of repeated arrests and convictions of men like this one, men who on being discharged from imprisonment go back at once to crime, hoping each time to escape punishment altogether or in part, through the tenderness of the jury or the sympathy of the judge?

It does not need to be said that no attempt is here made to do more than outline the plan by which this reform could be carried out, enough has been written, I trust, to suggest the need of a decided change in the penal system now established in this state and the way by which this change might be wrought. And let me suggest further that this is an opportune time for the discussion of this subject. For there has never before been a time in the history of the civilized world when social questions received so much attention as now, and when hope was so high in regard to the betterment of the race through the improvement of social conditions. In ancient times the songs of poets and the dreams of philosophers and philanthropists related to the fabled Age of Gold, a time in the remote and misty past, when all mankind dwelt in a realm of peace and virtue and happiness. But in the closing years of the nineteenth century we have transferred the Age of Gold to a future day; a day distant, undefined and visionary it may be; a day in which peace and social order shall reign and virtue be crowned and happiness be the possession of the humblest of the race through social reforms which shall be the outgrowth of man's true and wise humanity to man.

# *DUTIES OF TRIAL JUDGES AND METHODS OF PROCEDURE.*

HON. FREDERICK J. RUSSELL.

The Circuit Judges of Michigan have been selected as the arbiters of the great differences that exist and have existed between the citizens of this great State, either as final arbiters of the facts or as arbiters on the lines upon which those facts should be presented and acted upon by a jury,—the great final arbiters of the facts as they are presented in all their phases. That selection is but temporary; it is but proper to glance at the relations which the Judges, through the courts, sustain to the people and the relations that the Courts and Judges sustain to the tax-payers of their respective circuits, and to the State at large.

The Judge is selected but for a short time, by the will of the people; the Court is permanent and supported by the majesty of the law. When the Court speaks, its mandates are respected and considered by all men. Yet the Judge but speaks through his Court, and his Court is in a great degree what the Judge may make it. The Courts are established upon a basis approved by long years of experience, which has been handed from generation to generation, by selecting the best thought from the brightest intellects of the ages, and retaining the forms which have been considered and approved as best and most satisfactory to accomplish the desired object. Some of the ends to be accomplished are: that the differences between the people be settled in the least possible time; that such settlements be permanent; that evenhanded justice be meted out to all, the rich and poor, high and low; that the court be easily approached; that the weak and inexperienced be protected from the strong and designing; that the criminal laws be enforced, and through them, the rights of person and property protected; that all questions of fact be so presented to a jury, the great bulwark of American liberty, that the facts be so found that all fair-minded men shall feel that their rights are safe and sacred in the hands of the Courts where they are wont to look for protection and relief; and that all this be accomplished with the least possible expense. Such is a Court; such is the theory of the law, properly administered.

It has been the custom for centuries to license parties who were

learned in the law to appear before the courts to assist litigants and the Court, to accomplish the object for which Courts are established. The Judge who most nearly controls his Court so that these objects are accomplished, most nearly fulfills his obligation to his constituency. For the purpose of assisting in the accomplishment of these ends, rules have been established, and it is probable that others, salutary and arbitrary, should be established by which the proceedings should be controlled. In my judgment, the Judge who best observes the rules of practice and compels every officer of his Court to do the same, will, in the end, reach the most desired results. A disregard of the established rules often accomplishes the opposite of that for which Courts were established. There are few circuits in Michigan that have no law cases which one of the parties desires to try and has been asking the Court term after term for five or six years to be heard, and in vain, until the litigants one or both have gone to the poorhouse or an untimely grave in seeking to obtain their just rights. Some cases in the Chancery Court are still longer lived. Yet Judges allow the parties who have been licensed to assist honest litigants, upon one pretext or another, by relaxing the rules, to absolutely obstruct the ends of justice. Such leniency at the time may seem a kindness to the attorney or litigant. In most cases such is not the fact. The practices of the obstructionist are being so much tolerated by Judges, and the relations between the people and the courts have become so strained, because of the delays, that very many of the people feel that they had better suffer wrong and injury than commence a litigation where they might be subject to the worry, expense and annoyance, for a series of years, incident upon trying to obtain their rights in Court. The remedy is to compel the trial of causes by observing the rules. If a case in the Circuit or Chancery Court is not tried within the first year of its life, I think it safe to say that something is wrong with the Court. Litigants have a right to have their cases tried promptly. Anything short of that is to some extent a denial of justice and their rights. The labor of the Court should be performed with all the care, patience and consideration that the Judge is able to bring to bear upon the various questions at issue, and to that end he has a right to the honest effort and research of the various attorneys that may be engaged to assist in the litigation, so that when a cause is tried the settlement may be permanent.

A feeling seems to be entertained by some, and I have wondered

whether that feeling is not growing, that a person of wealth or one high in station receives more consideration than one who is poor or low in station, and that certain attorneys are more favored with the ear of the Court than others. It has been suggested that there have been Judges, who in disposing of a case, have rendered their judgments in favor of the litigant having the largest bank account and that because of unfortunate circumstances the man of small means or in a low station in life has been put aside by the Court's trying the man and not the issue. I feel assured that the Judges of Michigan are still trying the issues presented and not the men or their circumstances.

It is important that the Court be easily approached and that the weak and inexperienced have a careful and patient hearing. It It has been true in all ages that the strong will care for themselves. It is truth to-day. It is one of the duties of the Court to guard the rights of the weak against the strong, whether that strength be in ability or wealth.

One of the important functions of a Court is to administer and see that the criminal law is properly enforced, acting as a shield and protection to the unfortunate who may be accused of crimes of which they are not guilty, and that the criminal law be so enforced that the rights of the community be protected, and that it be so administered that crime will steadily decrease until it reaches the low water mark. These matters depend somewhat on the officers of the Court. For one term the prosecuting officer may be a man possessed of great ability with an eye singled to securing the most convictions; in fact, quite a proportion of the criminal cases may be over-prosecuted, the officers overlooking in part the fact that the respondent is one of the people whom it is his duty to protect. We then meet a prosecuting officer who is never ready with his cases or witnesses, and is so constituted that he is unable to cope with the attorney who is liable to be pitted against him in a large number of the criminal cases that he is called upon to prosecute, and the result may be that the guilty go unpunished. The other officer of the Court may be a man not especially adopted to the position of sheriff, in fact, I will say one of those officers that we have heard of in olden times, whose only knowledge of criminals was from rumor that a crime had been committed but was unable to find any person guilty of crime and was always waiting for the guilty to surrender themselves up and admit the offence. In the next county, the officer knows instinctively when a crime has been committed and

who the guilty party is, in fact, seems to know of many crimes that have not been committed; and of witnesses who to him seem important, even if it be only from a financial standpoint; through zeal and energy many criminal cases are worked up where it would be much better for the people, the Court and all in interest except the sheriff, if they were allowed to sleep the sleep of death. These are all matters which in a degree must come within the supervision of the Court and are very important in the detection of crime and their prosecution and the proper enforcement of the criminal law.

After conviction, a very unpleasant and painful task is imposing the judgment of the Court. What shall be done with Jones and Smith? We have a man in the prime of manhood, convicted of a grave offence, who is seen at the trial by the judge for the first time. The judge, anxious to do his duty to the people and the prisoner, seeks in vain for information that will throw light on his past history. Yet this is one of the most important duties that the Court can be called upon to perform. It will hardly do to have a fixed punishment for each person that may be convicted of burglary. We are compelled to act as we see the individual. When Smith stands up, every one knows him and has for forty years, and if any one has ever known any good of him or if there ever was a time when he was not guilty of crime, that time has not been reported; it is with ease that his case can be disposed of. Such a person, when fairly convicted, should be disposed of with a stern hand, and the Court should take into consideration his former conduct, and such a person should receive a much longer sentence than the one about whose former conduct there is uncertainty. In passing sentence upon persons convicted of crime, to me it would seem important to take into consideration the age, former conduct, former conviction and sentence, the probable effect the judgment may have upon the man, and what effect the sentence may have upon others, believing that it is not so much the severity of the sentence that deters others from committing crime as the certainty of detection and punishment. The hope of escape and of evading punishment, I think, is the cause of many crimes. That is one reason why, in my judgment, constant agitation regarding pardons, and the investigation of quite a proportion of convictions by the Pardon Board, may tend to increase crime. It is important to have a pardoning power. I have had criminals convicted in my court who have commenced to arrange their case for the Pardon Board before they have received sentence. I do not believe that the pardoning power is too freely exer-

cised; still I feel that the hope that that machinery raises is what might be termed a false hope, extracting the sting of the certainty of conviction and punishment. I believe it to be the duty of the Judges to take some action tending to equalize the sentences on criminals in the various courts of this State. I should say by taking proper steps to determine the average sentence of the criminals now in the various prisons for each of the various offences, and to take that average as a standard sentence and work from that sentence as the circumstances of each particular case might present itself. I have no doubt but that information would be prepared and furnished in convenient form for the Governor or Pardon Board, upon request. My opinion has been sought as to whether it might not be advisable for the various Judges, upon convictions, to prepare a brief statement of the cause for parties that might desire to review the cause later. I think such a statement a very proper one to be made at the time of trial by the prosecuting attorney and by the Judge, and it might add to the value of such statement for the Judge to state why the sentence imposed was above or below the standard.

It is important that a man accused of crime, who is poor and unable to make a suitable defense, should be provided with counsel and have an opportunity to obtain the necessary witnesses at the expense of the County. I have no doubt under such humane provisions large sums of money are annually filched from the County Treasurers of the various Counties of the State. We find attorneys in the various counties who seem to think that no criminal is competent to plead guilty unless he may be represented by counsel, and that the law contemplates that there is no obligation resting upon a man accused of crime to use all means in his power to obtain counsel and witnesses and prepare for his trial through his relatives and friends, but that with such the responsibility rests upon the County. I am not willing to fully assent to that view.

It seems to me to be important to the proper enforcement of the criminal law of the state that further and better facilities be provided for the care and confinement of young men convicted of crime between the ages of 16 and 20 years. The State house of correction at Ionia was thought to be an institution that would properly fill that want. I am of the opinion that such want is not fully supplied. I would recommend a consideration of that subject. It has seemed to me to be advisable that some provision be made in some part of the reform school for the reception and confinement of at least a part of that class of offenders.

The Courts and the transaction of business therein are attended

with great expense. Because of that fact they sustain an important and substantial relation to the tax-payer. To the citizen it is important that the law be administered; to the tax-payer, that the business be conducted with dispatch, and that economy and prudence be exercised to reach the best possible results with the least expense. I can see no reason why, during the time that a jury is in attendance, the Court should not remain in session seven hours per day. I know it to be claimed by some that so long a session is not desirable or profitable. To those who find so many hours objectionable, is it not caused in part from the fact that some Judges allow the annoyances that are sometimes attendant upon holding Court more consideration than they may be entitled to? In most Courts there is no fault with the regular session, as to its duration. In all courts there are very many causes to compel delay. Those little losses, in my judgment, cause much of the delay, and are a great source of expense. As I figure the expense of the Circuit Court with a jury, the average expense is about $12.00 per hour. The cause is put on trial, a witness is late; at the opening of the next session one of the attorneys is compelled to go to his office and in consequence is late; very soon after the session begins a witness arrives that the attorney has not conversed with; a half hour before the regular time to suspend one of the attorneys suggests to the Court that the case has proceeded much faster than was expected and no witness was present and it is desired that the Court suspend for the day; the next day a witness that had not been subpoenaed but who had agreed to attend and was not present and the evidence could not be closed without his testimony; at the noon hour the evidence is closed; the attorneys are compelled to request the Court for a longer noon hour that their requests to charge may be prepared; at the opening of the session in the afternoon the requests that the Court has passed upon at least monthly must be argued; then one of the attorneys suggests to the Court that this is a very important case, not on account of the amount involved but there is a principle in it, and requests that the rule fixing the time allowed to address the jury be extended. These and very many other opportunities arise where delay often occurs. They are a waste of time and are unnecessary and unwarranted. There are many times that delays will of necessity occur or the ends of justice will be defeated. We would not expect a prudent business man to run his own business and tolerate such useless delays or extravagant use of time. He would remedy the evil or be compelled to go out of business. I know of no good reason why a Court should not be run and the expenses looked after as a man would run and look after his own business. This

waste of time may be largely avoided by compelling all parties having business in the Court to be in attendance while their business is engaging the attention of the Court, and that the witnesses be in the court room, and that the useless expenditure of time in argument be avoided. If the Court would enforce the rules of practice, attorneys, litigants and witnesses would be better accommodated and the ends of justice would be better served, and a very large amount of money would be saved to the tax-payer and to litigants. In most cases, all parties will be in readiness if they are compelled to be. In my judgment, where parties are required to be ready, and if they are not ready, the litigants should bear the burden, that will be better and in most cases cheaper for litigants and all parties in interest. Some of the public have criticised the jury system. I approve of the law which is the foundation of that system. It is a safe, honest, fair, humane system, and, it seems to me, should be approved and commended by all fair-minded men. It is true that the system is at times abused. Many times jurors' names are furnished by reason of political favor, or furnished without regard to the qualifications of the men for the position. The law contemplates that well-informed men, those possessed of all their faculties, be selected. With such, protected with the various challenges, no person should complain. In my judgment, most men whose duty it is to return the names of jurors, may be induced to observe the law more strictly, and by that means that branch of the Court may very shortly become more in favor, and more business men will feel that it is there duty to bear their share of the public burden in that behalf.

While I believe it to be best to observe the rules and to compel others to do the same, and that causes be controlled by well-settled rules of law, many technicalities should be swept away, and the very right of the controversy at all times reached. If that end is accomplished, the law will usually care for itself. There is no good reason why the Court should allow judicial wrong to be accomplished simply because a verdict has been reached or because there may be some warrant of law for the act. If that law exists in precedent, better give the Court of last resort an opportunity to allow right to prevail by making a new precedent. I believe that the Supreme Court of Michigan are controlled by the kind of manhood that will be glad of the opportunity to exercise that prerogative. The Circuit Judges of Michigan and their Courts are responsible for the correct findings of fact in the causes tried in their Courts. Any Judge should have the nerve and manhood to insist that no injustice be done by facts found in conflict with his sense of justice and right. We are not called upon to shirk that responsibility upon the jury or upon the commendation of public opinion.

# MICHIGAN LAW JOURNAL.

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## *NOTES.*

THE TEXAS RULE OF DAMAGES IN TELEGRAPHY.—The broad liberality of the Texas rule relative to the recovery of damages by senders of telegraph messages for injury to their feelings by reason of delay in the transmission of dispatches, has given rise to a vast amount of litigation. The digest reports in reference to actions against telegraph companies are replete with Texas citations, the majority of which appertain to the illness or death of relatives. Texas juries are apparently possessed of prejudices even more radical and rabid than those which ordinarily influence juries, where corporations are concerned. In many cases where the statement of facts would preclude all probability of mental suffering in any appreciable degree, the juries have rendered verdicts against the telegraph company. It was clearly established in one of the most recent cases that there was but slight, if any, affection existing between the person to whom the telegram was addressed and the sick relative, yet a verdict of excessive damages in the lower court was sustained. An ingenious plea was that, by which, after it had been shown that it would have been impossible to deliver the message in time to enable the plaintiff to attend the funeral of her father, a verdict of $500.00 was nevertheless obtained against the company, on the ground that had the plaintiff received the message promptly she could have telegraphed a request that the funeral be postponed, thus enabling her to be present. The Supreme Court has reversed the judgment in this case; however, a verdict of $1,000.00 for failure to promptly deliver a message conveying intelligence of the sickness of a half sister was allowed to stand.

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A FEDERAL COURT RULING ON THE RESPONSIBILITY OF NATIONAL BANK DIRECTORS.—The case of William B. Prescott, President of the International Typographical Union, against Theodore P. Haughey and the other directors of the defunct Indianapolis National Bank, possesses peculiar interest in that it marks the first instance wherein

proceedings instituted against national bank directors have been successfully maintained in the Federal Court. It was alleged by plaintiff that he was induced to deposit in said bank the funds of the Typographical Union, by false statements on the part of the defendants relative to its solvency. The suit was originally commenced in the Superior Court, and Judge Winter, who then presided over that court, held that inasmuch as the case was against the officers of a national bank, the Federal Court would have jurisdiction. Recently in remanding the case to the Superior Court, Judge Baker of the Federal Court enunciated the following rule: "The national banking law does not contemplate that when fraudulent bank reports are made, the receiver, for instance, may be held responsible. I do not believe that bank officers may make lying statements and escape unscathed. It is not the bank as contemplated under the law that is to be blamed, it is the officials who make the false representations." He decided further that in this particular instance, the deposit was obtained as the direct or indirect result of the false and fraudulent representations of the defendant. "This is a new case in the Federal Court," said Judge Baker. "I maintain that I have laid down a rule which upholds honesty."

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CAN A NEUTRAL SUPPLY A BELLIGERENT WITH MUNITIONS OF WAR?—In commenting upon the course of the English Government in not interfering with the contracts of certain English firms to transport supplies for the French troops engaged in hostilities with the Malagasy Government, our valued English contemporary the *Law Journal*, London, expresses the opinion that the doctrine that a neutral power is not obliged to prevent its citizens or subjects from supplying a belligerent with munitions of war is passing away. It bases this upon the provisions of the English Enlistment Act which punishes such aid by fine and imprisonment, and upon the views of the latter writers on international law who lay down the rule that it is "the true character of a neutral to abstain from every act which may better or worsen the condition of a belligerent" and that supplying munitions of war "stand the same footing as the enlistment of troops for foreign service, and should be equally repressed by the neutral government." (Sir R. Phillimore, iii, 237-241). This seems correct in principle, but we doubt that it will ever become an established rule of the law of nations. This county is committed to the opposite doctrine as a brief reference to the decisions of the courts will show. In the case of *United States v. The Itata, 56 Fed. Rep. 505*, it was held that "putting arms and ammunition on board a vessel with the purpose of having them transported to another country with which the United States are at peace, for the use of an insurgent party therein, is not a violation of the neutrality laws." See also *United States v. Trumbull, (Dist. ct.) 48 F. 99; Same v. The Robert and Minnie, 47 Id. 84; etc.*

THE ATTEMPT OF A STATE TO CONTROL THE SALE OF PATENT RIGHTS IS AN INVASION OF NATIONAL AUTHORITY.—The Supreme Court of Kentucky has recently held, *Commonwealth v. Petty, 16 Ky. Law Rep. 488* that an act requiring persons to pay a license tax before selling or offering to sell patent rights or territory for the sale or use of patent rights, was unconstitutional and void; and that a State has no authority to regulate such a sale in any way, the matter being under the exclusive control of Congress.

The Court distinguished the patent right or the right in the discovery, from the patented article made by the application of the discovery. It held that the former was an incorporeal right over which Congress, by virtue of article 10 of section 8 of the constitution conferring upon it power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respected writings and discoveries," alone has authority.

This ruling is in full accord with the Michigan decisions. In *Cranson v. Smith, 37 Mich. 309*, a statute requiring obligations given for patent rights to contain the words "given for a patent right" was held to be void as an invasion of National authority. The Court said: "The subject of granting patents and regulating the rights of patentees has been placed by the Constitution of the United States in the control of Congress. Where any right or privilege is subject to the regulations of Congress it is not competent for State laws to impose conditions which will interfere with the rights or diminish their value. In those cases where the congressional power is lawfully exercised, it is supreme." The right of an owner of a manuscript was held, in *Dart v. Woodhouse, 40 Mich. 399*, to be purely an incorporeal right entirely independent of locality. In *People v. Russell, 49 Mich. 619*, the Court went further and decided that placing restrictions upon the sale of patented articles was an unconstitutional interference with the prerogatives of Congress and therefore void. In that respect the Court departed from the case of *Commonwealth v. Petty, supra*, and the rule laid down by the courts: *Webber v. Virginia 103 U. S. 344; Patterson v. Commonwealth, 11 Bush 311 etc.*, which is that only the patent right and not the article made by reason of the application of the patent, is beyond State legislation.

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PAROL SALES OF GROWING TREES.—The effect of parol sales of growing trees is at present receiving a good deal of attention from our contemporaries. This is a subject in which Michigan by reason of its large lumber interests is interested more than most of its sister States, and fortunately the Michigan law governing such agreements is now clearly defined.

It is well settled that such an agreement operates merely as a license to enter upon the land and sever the timber, and that it is not affected by the statutes of frauds either as an interest in land or as

a sale of chattels. The license may be revoked at any time before the trees have been severed from the land and thereby converted into personalty; if part of the timber be cut that part only is excepted from the revocation. The sale of the land is in itself a revocation of the license, and the only way to acquire absolute title to the timber is by deed, in the same manner as the fee of the land: *Greeley v. Stilson, 27 Mich. 157; Haskell v. Ayres, 35 Id. 90; Wetmore v. Neuberger, 44 Id. 362; Spaulding v. Archibald, 52 Id. 365; White v. King, 87 Id. 107.* In Massachusetts, Wisconsin, New Jersey, and Indiana, the law is practically the same: *Hill v. Hill, 133 Mass. 103; Fletcher v. Livingston, 153 Id. 388; Daniels v. Bailey, 43 Wis. 566; Slocum v. Seymour, 36 N. J. L. 138; Armstrong v. Lawson, 72 Ind. 498, &c.* The whole question is fully and elaborately discussed in *Owens v. Lewis*, 46 Ind. 488.

In England a very different doctrine was establishsd as early as 1697, when *Treby, C. J., 1 Ld. Raymond 182*, reported to the other Justices that he had been called upon to decide whether a parol sale of growing trees might be by parol or had to be in writing by the statute of frauds, and that he had ruled that it might be by parol, the subject matter being a bare chattel. This decision was followed in the recent case of *Marshall v. Green, 33 L. T. Rep.* In Maine, Maryland and Kentucky a similar doctrine has been adopted. See: *Erskine v. Plummer, 7 Greenl. 447; Smith v. Bryan, 5 Md. 141; Byamee v. Ruse, 4 Met. 372.*

## *LEGAL MISCELLANY.*

The shortest charge to a jury on record in the Wayne Circuit Court was delivered by Judge Donovan recently. He said: "Gentlemen of the jury, if you believe the plaintiff, find a verdict for plaintiff, and fix the amount. If you believe the defendant, find a verdict for defendant. Follow an officer."

The Russian courts have reversed the assumption of the American tribunals that where a husband and wife are drowned in the same disaster the wife dies first. The Russian doctors have testified unanimously that the man would be the first to die, because the woman is more agile, and keeps herself longer above water.—*Current Literature.*

A New York court has decided that when a passenger drops a nickel on the floor of a street car it pays his fare the same as if handed to the conductor, and that in case of a larger coin the conductor must give him the proper change. The theory of the decision is that the company owns the car, and a coin dropped accidentally is therefore in its custody.

The treasury officials have made an important ruling in respect to the liability under the income law of dividends received from corporations. It is held that dividends received by a resident of the United States from corporations, foreign or otherwise, doing business wholly without the United States and having its principal office and property out of the United States must be returned as income. Such corporation not being liable on its net profits, the dividends must be returned as income by the persons receiving the same.

Judge Miller in the Police Court of the District of Columbia recently decided an important point of international law in the case of Manuel de Almagro, charged with embezzlement of $3,000 from the Argentine minister residing in Washington. The attorneys for De Almagro put in a plea that he was a part of the Argentine legation, being a translator and secretary to the minister and as such was not subject to criminal or other jurisdiction of the United States. After discussing the subject in all its bearings, Judge Miller held that the statutes do not cover the case of De Almagro and he ordered him discharged and the case against him dismissed.

Miss Kelso, librarian of the Los Angeles public library, lately brought suit against the Rev. J. C. Campbell, charging him with slander. The basis of the action was a prayer offered by the defendant before his congregation in the First Methodist Episcopal Church, in which he said: "O Lord, vouchsafe thy saving grace to the librarian of the Los Angeles city library and cleanse her of all sin, and make her a woman worthy of her office." Rev. Mr. Campbell demurred taking the position that his statement was privileged. The court held that a slander can be perpetrated in the form of a prayer as readily as in any other form of speech.

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THE ANTI-FUSION LAW was held to be constitutional by the Michigan Supreme Court (*Todd v. Board of Election Commissioners*) in an opinion filed March 25th last. The Act (Act No. 190, Public Acts of 1891) provides that "it shall be unlawfull for said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office."

It was argued that the law was unconstitutional because it discriminated between political parties and imposed a political test as a condition to becoming a candidate for office. The court upheld the constitutionality of the law, but withheld a written opinion until further opportunity was given for a fuller consideration of the question. Though the validity of the law was upheld, the case of the relator was decided in his favor, on the ground that the act was prospective in its operation and did not apply where the nominations of the parties had been made before it went into effect.

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THE CAPSULE TRUST CASE. It appeared in this case that a number of corporations and individuals, engaged in the manufacture of hard, empty gelatine capsules, undertook to form a company under the laws of New Jersey, to transfer their assets to this new company and to receive in lieu thereof shares of stock in the newly-formed corporation. One of the parties, the Merz Capsule Company, a Michigan corporation, after the signing of the articles, but before it had parted with the possession of its property, withdrew from the projected combination, gave notice to the other parties and continued to operate its plant independently. The United States Capsule Company, which was the name of the new organization, entered *vi et armis* upon the premises of the Merz Company and endeavored to take possession. The latter company immediately filed a bill for an injunction in the Wayne Circuit Court, whence the case was removed to the Federal Court on the ground that it involved the construction of federal statutes, notably the Sherman Anti-trust law. The case was argued last January by D. E. Heineman and E. F. Conely for

the complainant and H. E. Spaulding, F. L. Brooks and Russell and Campbell for the defendant. Judge Severens, on March 19th, handed down an opinion in favor of the complainant, holding the agreements void and placing the parties in the same position they were in before the execution of the same. The defendants are permanently restrained from interfering with the complainant company. The opinion holds that the combination is contrary to the laws of Michigan, that the Michigan company had no right to become a shareholder in a corporation of New Jersey, whose laws place restrictions and duties upon corporations, of an entirely different nature than the Michigan laws require. The Michigan statute of 1889, vitiating trust agreements designed to enhance prices, is also cited, showing that the court was not left in doubt as to what was the object of the combine. The opinion further holds that it is not necessary to apply the acts of Congress bearing upon the questions involved, the principles of the common and of Michigan law disposing effectually of the controversy.

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CAN A CIRCUIT COURT ATTACHMENT ON REAL ESTATE IN DIFFERENT COUNTIES BE ENFORCED UNDER EXISTING LAWS? Howell's Statutes, Sections 7900 and 7991, provide for the levying of a circuit court attachment against the property of defendant, whenever the same may be found within the state, sufficient with that which may be seized within the county where the attachment is issued to satisfy the demands and costs, and provide that this may be served by the sheriff of the county where the attachment issues.

In the case of *Avery v. Stevens, 40 Mich. 249*, our Supreme Court decided that, "When due diligence has been observed by the creditor in the prosecution of his claim, the attachment lien continues until a reasonable time has elapsed for the issuing of an execution and levy thereunder."

Howell's Statutes, paragraph 7669 provides that executions against the body or against the property of any party may be issued at the same time to sheriffs of different counties. This was Section 10 of Chapter 106 of the Revised Statutes of 1846. This statute was amended, paragraph 7669 "A," Howell's Statutes, being Act 105 of the Session Laws of 1847, as follows: "That chapter 106 Section 10, be so amended that but one execution shall issue at the same time."

In the case of *Atwood v. Bearss, 45 Mich. 469*, the court decided that issuing an execution to two different counties at the same time (as was done in that case) was an irregularity.

The query is, how under these statutes and the decisions of our court, can executions be issued to the different counties where real estate has been attached, so as to continue the attachment lien and not have executions issued at the same time to different counties? Does the law giving the sheriff a right to levy an attachment upon real estate in different counties repeal Section 7669 "A" by implication, so that ex-

ecutions in attachment cases may issue to the sheriff of the different counties where property has been seized upon the attachment, or does it give the sheriff in the county where the attachment issued, the right to levy his execution on land in different counties, the same as he levied his attachment? The latter would be a reasonable solution, but there seems to be neither legislative or judicial authority for this interpretation of the law, hence, as the law stands, a sheriff has the right to attach real estate in different counties at the same time, but no right to levy an execution outside of his own county, as by another section of the statute only one execution can be issued at the same time on a judgment, whether it is a judgment in an attachment proceeding or not. He can enforce only one of his attachment liens at a time where the land is in different counties.

JOHN M. CORBIN.

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THE RIGHT OF A FOREIGN CORPORATION TO PLEAD THE STATUTE OF LIMITATIONS.

*Editor Michigan Law Journal:*

In your March issue you refer to the right of a foreign corporation to plead the statute of limitations.

I recently raised the question in our Supreme Court in the case of *Wolf vs. District Grand Lodge, 60 N. W. Rep. 445*, but the point was not passed upon.

While the weight of authority may be in favor of the right, yet I should regret to see the rule approved here, without some modification.

Your statement that Nevada stands alone in following the New York rule is hardly correct. See *Larson vs. A. & T. Co. 56 N. W. 915 (Wis.)*.

At the risk of wearying you I will repeat a portion of the argument from my brief.

The right was formerly upheld in Iowa, but recently the rule has been restricted there to Railroad companies. I refer to the case of *Winney vs. Sandwich Mng'f. Co. 55 N. W. Rep. 421.*

The court says that a Railroad Company is of necessity obliged to operate its road, and have officers and agents in the state where its road is situated in order to carry on its business. Not so with a manufacturing corporation.

To quote their language: "A foreign corporation, whose business in in this state is such that it is not incumbent upon it to put itself in position to be at all times subject to the service of process, ought not to be permitted to shield itself behind the statute of limitations, because it may at some time or times (perhaps unknown to one having a cause of action against it) have an agent in this state upon whom process could be served. There is a wide distinction between the case of a railroad company, whose officers or agents may always be found within the state, and can be readily reached with

process and a foreign manufacturing company, having perhaps a general agent in this state, who may have no settled abiding place, whose relations to the party he serves are not generally known to the public and the knowledge of whose coming and going must of necessity be limited to a few individuals."

There might be as good reason for also making an exception in favor of the ordinary insurance companies, under our special legislation which permits process against them to be served on the Commissioner of Insurance.

But strictly under the language of our statute of limitations it is doubtful whether a foreign corporation can plead it. The language of the act is that, if when a cause of action accrues against any person he shall be out of the state, the time he shall be absent from and resident out of the state shall not be taken as any part of the time limited for the commencement of an action. This language has always been held to apply to non-residents, as well as residents. *Milton vs. Babson, 6 Allen, 322; Parker vs. Kelly, 21 N. W. Rep., 539, (Wis.) Stanley vs. Stanley Adm'r., 47 Ohio St., 225.*

A foreign corporation acquires no residence by doing business in this state; it always dwells in the state of its creation. *Wood on Lim., Sec. 250; Larson vs. A. & T. Co., 56 N. W. 915 (Wis.); St. Clair vs. Cox, 106 U. S., 350 (Mich.); See D. F. & M. I. Co. vs. Judge 23 Mich. 492.*

A foreign corporation is not subject to suit in this State, even thought it carries on business here, unless subjected thereto by some express provision of law. *Watson vs. Judge 24 Mich. 38; M. B. & I. M. vs. Judge 72 Mich. 155; B. E. Co. vs. E. G. L. Co. 23 Fed. 838.*

In 1881 the legislature passed the first general act in this State providing for suits against foreign corporations. It permits suits to be instituted *where the cause of action accrued in this state* by service of process "upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any vessel belonging to and in the service of the corporation against which the cause of action has accrued." *How. St. § § 8145-6.*

The title of this act is "An act to provide for suits against foreign corporations in the courts of this state."

This statute was intended as an enabling act, to enlarge the rights of citizens of this state. It does not expressly give the right to plead the statute of limitations, and can only do so by implication from the language of the second section. If the right to plead the statute is conceded without any qualification, it could be used to the disadvantage instead of advantage to our citizens.

I think it is clear that some limitation is advisible upon the general right of a foreign corporation to plead the statute.

G. A. WOLF.

# *RECENT MICHIGAN DECISIONS.*

ASSUMPSIT—PLEADING—EVIDENCE.—Where in a sale of land the consideration for both the land and the timber cut was included in the deed, the vendee will not be precluded from showing the actual arrangements made at the time of the sale. An action in assumpsit upon the common counts will lie to recover the purchase price paid where the vendor has no title or there has been a failure of consideration. A vendor being tendered his day in court to defend his title and having failed to appear, the judgment in that suit will conclude him. No exception being taken in the lower court to a ruling, it cannot be raised upon appeal. *Fitzpatrick v. Hoffman.* (*March 5.*)

ASSUMPSIT ON CONSTABLE'S BOND—PARTIES.—Howell's Statutes § 6988 confers jurisdiction upon justices of the peace where an action is brought upon a constable's bond in behalf of the person entitled to moneys which the constable refuses or neglects to pay. Such action is not confined to those "whose right to the money has been adjudicated" but may be brought by the person in whose interest the money is received either upon execution or without it. *Montgomery v. Martin.* (*March 19.*)

BUILDING AND LOAN ASSOCIATIONS—STATUTE AUTHORIZING FORMATION CONSTITUTIONAL.—Where a building and loan association organized under § 8 of Act 50, of the laws of 1887, takes a joint mortgage from a member and an individual not a member, such joint obligation cannot be defeated on the ground of *ultra vires.*

2. The retention of a premium out of the loan is not in excess of the powers of the corporation.

3. When a wife who is joint owner with her husband in any estate joins in a valid mortgage with her husband, her interest passes.

4. The statute authorizing the formation of building and loan associations is constitutional. *Building and Loan Association v. Billings.* (*Feb. 26.*)

CHATTEL MORTGAGE OF MINOR.—In an action for the recovery of property claimed under a chattel mortgage given by a minor, it being shown that the mortgage was executed and the suit commenced before the minor became of age, the question whether the mortgage was void or only voidable is immaterial. A chattel mortgage cannot be enforced against a minor mortgagor. *Barney v. Rutledge.* (*March 5.*)

CONTRACTS—MATERIAL MAN.—Under an arrangement made with a contractor who was to furnish all materials and erect a certain school building, the plaintiff agreed to furnish the necessary brick at a certain price per thousand. *Held*: That the only relation in which he stood to the original contractor or the school board was that of material man and not as sub-contractor. *Staffon v. Lyon et al.* (*Feb. 26.*)

CONTRACT FOR SALE OF GOODS—WARRANTY—WAIVER.—Where the contract between the parties to a sale of goods is put in writing, and no fraud in connection with its execution is claimed, the only warranty for which the vendor is liable is that contained in the writings. Where by the terms of the contract the vendee agreed to give the vendor 60 days notice of any defect in the machine sold, a continual use of the machine without complaint until the notes given for its payment fell due, will operate as a waiver of any defect, and of the right to reject it. *Zimmerman Man'f'g Co. v. Dolph.* (*March 5.*)

CONTRIBUTORY NEGLIGENCE — FIRE — BUILDING NEAR RAILROAD TRACK.—In an action brought to recover the value of a planing mill destroyed by fire originating from the engine of defendant in operating a train on its tracks, it was *held* that the erection of such a building in close proximity to the railroad tracks was not negligence *per se.* If the fire happened from the failure to take all reasonable precautions then such failure would be contributory negligence. There is a presumption that every one will act with due care and it cannot be imputed as negligence to one party that he did not anticipate negligence on the part of another. *Briant v. Railroad Co.* (*March 5.*)

COSTS IN EJECTMENT.—In an action against several defendants for the recovery of land and possession thereof, etc., where the trial proceeds against all and a joint verdict is rendered in favor of all the defendants, but one bill of costs can be made against the plaintiff. *Black v. Carpenter Circuit Judge.* (*March 5.*)

CRIMINAL LAW—COMPLAINT AND WARRANT—LIQUOR LAW.—A complaint and warrant drawn for a violation of Act 313, Public Acts of 1887, which charges in one count an engaging in the business without paying the tax required by Section 1, a failure to post the notice required by Section 6, and a failure to post the receipt as required by the same Section is not bad for duplicity. If the indictment is founded upon a statute, and it contains allegations covering all the terms of the statute and making a complete offense, and then adds something by way of making the offense appear more enormous, this latter matter may be regarded as mere surplusage, it will not vitiate the indictment and need not be proved. *People v. Aldrich.* (*March* 19.)

CRIMINAL LAW—PLEADINGS—EVIDENCE.—The return of a Justice of the Peace certifying that it appeared that an offense had been committed and that there was cause to suspect the defendant to be guilty thereof, is a sufficient finding of probable cause. A defect in an information curable by amendment cannot be taken advantage of after verdict, no objection being made during the trial. Testimony offered to show the violence of the assault committed, as bearing upon the question of intent, is admissible. *People v. Sutherland.* (*March* 19.)

DEFECTS IN HIGHWAY—NEGLIGENCE—PLEADINGS.—The defendant constructed a highway in the near vicinity of a mill dam, and failed to erect barriers to hide the view of the water from horses passing along the highway. Plaintiff's horse, while being driven on this road, became frightened at the sight and noise of the falling water and threw the buggy down the enbankment. The injuries complained of were caused by plaintiff's jumping to escape serious injuries. *Held*: That it was a question for the jury to determine whether or not it was negligence to leave the approach without barriers, when no other means of preventing the injury existed. Where no objection is raised in the court below to a variance between the declaration and the proofs offered, such objection cannot be raised upon review. A variance between the declaration and the proof as to the exact point at which the injury occurred, is not fatal. *Ross v. Township of Ionia.* [*March 5.*]

ELECTION OF REMEDY—PROOF UNDER GENERAL ISSUE.—Where property has been tortuously taken and converted into money, the plaintiff may sue in tort or he may waive tort and sue in assumpsit, but having once elected to sue in assumpsit, he cannot afterwards bring an action of trover. The election is made as soon as the action is commenced in one form or the other. Under the plea of the general issue the defendant would have the right, not only to disprove plaintiff's right of possession, but also his title. *Thomas v. Watt.* (*March 5.*)

ELECTION LAW—ANTI-FUSION LAW CONSTITUTIONAL.—An act forbiding the printing of the name of a candidate nominated by two or more parties, upon an official ballot more than once, is constitutional. Such act is prospective in its operation and does not apply where the party nominations were made prior to the time the act took effect, and where the candidate is required by the act to select the place his name shall occupy upon the ballot. *Todd v. Election Commissioners* (*March 25.*)

MECHANIC'S LIEN—WAIVER OF NOTICE.—When a lien is asserted by the original contractor and no rights of subsequent purchasers intervene, service of notice may be waived by the owner. A lien cannot be defeated by a deed previously executed but recorded subsequent to the filing of the lien. *Mouat v. Fisher.* (*March 5.*)

PROMISSORY NOTE—BURDEN OF PROOF.—In an action on a promissory note where it appears that the defendant is a married woman, the burden of showing that the consideration of the note passed to her, rests upon the plaintiff. *Fisk v. Mills.* [*March 19.*]

RAILROAD COMPANY—NEGLIGENCE—QUESTION FOR JURY.—Action against railroad company for injury alleged to have been caused by negligence in the loading of logs, on the company's cars. *Held*, That there being evidence from which the jury might have inferred that there was the usual quantity of logs loaded upon some of the cars it was a question for the jury to determine whether it was proper to load the logs in such a manner that they would be jolted by running the train in the manner in which it was run. A railroad company cannot discharge its liability to a passenger

by showing that its agents inspected the cars before starting, if, in fact, the train was not in proper condition with respect to the safety of the passenger. *Keating v. Railroad Co.* (*March* 19.)

REJECTION OF BIDS—ADVERTISEMENTS FOR PROPOSALS.—In advertising for proposals for furnishing materials, etc., for the erection of a school building, the Board of Education of Detroit, reserved the right to reject any and all bids and to waive any defects in bids. *Held*: That no fraud, corruption or collusion being alleged and in the absence of a statute requiring contracts to be awarded to the lowest bidder, the Board in rejecting the proposals furnished by the lowest bidder acted within the right reserved by the notice. Even when a bid has been accepted and the officers of a muncipality refuse to enter into the contract, mandamus will not lie to compel them to do so; but the remedy of the bidder, if any, is in an action at law for damages. *Chandler v. Board of Education.* (*March* 5.)

REMOVAL OF PRISONERS—PARDONING POWER.—The Legislature has full authority to provide prisons and to determine where prisoners may be sent, and the courts have no discretion as to the place to which criminals may be sentenced except as the legislature gives it. The determination of the Circuit Judge is qualified by the law and such rules and regulations of the prisons as may have been lawfully adopted. While the power to pardon criminals is vested exclusively by the constitution in the Governor of the State, the constitution also vests in the Legislature the power to provide by law regulations relative to the manner of applying for pardons. It was not the purpose of Act 118 of the Public Acts of 1893, which provided for a Board of Control, to infringe upon the constitutional prerogative or power of the Governor, and the fact that such board is authorized to make recommendations is no infringement upon executive power. *Rich, Governor v. Chamberlain, Warden.* (*March 19.*)

SALE OF MERCHANDISE—SEPARABLE CONTRACT—DELIVERY—DAMAGES.—Plaintiffs sued defendant for damages arising from his failure to accept thirteen carloads of potatoes shipped by plaintiffs to defendant in pursuance of contract. *Held:* That the contract was for successive deliveries and therefore severable, the buyer having the right of inspection and examination in each case; that by inspecting and taking the first two cars and paying for the same, the buyer was estopped from disputing their quality. He had no right to refuse to accept any succeeding cars by reason of any claimed defects in the potatoes in the first two cars. When the seller received notice from the buyer that he refused to pay the contract price for the goods he had the right to treat this as a repudiation of the contract, stop delivery, and sue for damages. The measure of damages would be the difference between the contract price and the market value of the potatoes. Actual sales are the best evidence of the market price, and the actual loss, as shown by the sales, would be the true measure of damages. *Williams v. Robb.* (*Feb. 12.*)

TAX SALE—VACATION OF DECREE—SERVICE BY PUBLICATION.—A decree upon default may be opened upon a petition showing an adequate excuse, unless a point has been reached where the court has no longer authority to alter or vacate its decree. No personal service having been secured against a part owner of lands he should be brought in by publication. Evidence from a printer to the effect that a notice of the pendency of the petition was published in his paper is not sufficient to show a proper publication of the required notices. Howell's Statutes, Section 1170 i 4, does not apply to an affidavit of publication in a proceeding to adjudicate a delinquent tax. *Benedict v. Auditor General.* (*March* 5.)

TURNPIKE ROAD—ABANDONMENT—REVERSION.—In the event of a corporation allowing a turnpike it owns to gets out of repair, the franchise is forfeited and becomes a public highway. Dedication to a turnpike road is presumptively made in contemplation of its continued use as a public highway, and the right of the public to continue its use on the termination of the corporation is implied. *Commissioner of Highways v. Cobb.* [*March 19.*]

WILLS—SPECIFIC DEVISES—CHARGE ON REALTY.—A testator directed that a certain legacy should be paid from the personal property on hand after the death of his wife, before any division of the personal property. *Held* to be a demonstrative, not a specific legacy, there being nothing in the will to show an intent to charge the land specifically devised with the legacy, it was not chargeable with it, upon failure of personal property to pay it. Where the rents and profits of the land were bequeathed to the widow during her life, and the property was then to be charged with certain legacies to the children, such legacies did not lapse but became vested in the children upon the death of the testator. *Hibler v. Hibler.* (*March 5.*)

# CURRENT LITERATURE.

The *American Magazine of Civics* for April contains the usual number of carefully selected articles on subjects of present interest. Among them are: "The Modern Theory of Representation," by Lewis R. Harley; "Revision of Constitutions," by J. H. Long. Eugene V. Debs contributes an article on "The Cry of Anarchist." The notes contain some very interesting reading, and is a department which adds great value to the magazine.

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The frontispiece of *The Illustrated American* for the week ending March 30 is a superb reproduction of Peixotto's picture entitled "Lilies," being a portrait of the little daughter of Senator John P. Jones. "A peep show of Liliputs" describes, and illustrates with a score of pictures, a remarkable exhibition of babies now on view at the galleries of the amateur photographer's club. In "Plays and Players" Mr. Nirdlinger criticises "An Ideal Husband," Oscar Wilde's new play at the Lyceum, and "The Foundling," an inordinately risque farce of English importation.

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The *Atlantic Monthly* for April contains installments of the two serials now running: A Singular Life, by Mrs. Elizabeth Stuart Phelps Ward, and The Seats of the Mighty, by Gilbert Parker. George Birkbeck Hill contributes the first of his papers, A Talk over Autographs which promises a most interesting series. John Foster Kirk contributes a discriminating study of Macbeth. One of the most appreciative tributes to Robert Louis Stevenson which has yet appeared comes from the pen of C. T. Copeland, and is printed in this issue, together with a short memorial poem, by Owen Wister.

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The *Review of Reviews* for April declares that our American postal service fails to hold its own with European services, and that the chief cause of this failure lies in the inability of our Government to command a high quality of permanent expert managerial ability. Civil service reform cannot be advanced too rapidly in that department says the *Review*. The editor discusses recent political events, especially the doings of the Fifty-third Congress, the appointment of delegates to an international monetary conference, the arguments before the Supreme Court on the constitutionality of the income tax and other incidents of the month under review

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Mr. W. H. Mallock, the eminent English Student of Socialism, has written for the April number of *The Forum* one of the most luminous explanations of the fallacies of Socialism which has ever appeared, entitled "The Real 'Quintessence of Socialism.'" It is a striking essay in Mr. Mallock's usual lucid style. Justin M'Carthy, the Irish Journalist, politician, historian and novelist contributes an article on "Lord Rosebery." Miss Alice Zimmern writes about "Women in European Universities," telling of the progress made by women in England, France and Germany toward securing admittance to the universities on equal terms with men: the privileges they have already obtained, and many other interesting facts. Mr. Henry Holt concludes his series of articles on "The Social Discontent," begun in the January number, suggesting more remedies,

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Each of the weekly issues of *Littel's Living Age* for March contain articles of more than usual interest. One of the most interesting is that upon "Argon" the newly discovered constituent of the atmosphere. This, together with the discussion as to whether bacteria are in themselves phosphorescent, or whether they are so only by virtue of their products, is of special interest to scientists. R. Wallace, M. P., in his article entitled "Single Chamber 'Democrats'," very forcefully criticises those whom he deems to be blindly in favor of the abolition of the House of Lords.

The publication office of *Public Opinion* is now at New York, solely, and not at that city and Washington as formerly. It was established at the latter city and moved gradually to its present location; thereby illustrating the natural tendency to centralization in the larger cities. The size has been changed slightly, and improvements made in its typographical appearance. In other respects there is little chance for improvement. No matter how many matters of importance may occupy the attention of the reading public, it seems to be always equal to the occasion. Its readers are always "up with the times."

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In the March *Popular Science Monthly* three industries are given prominence—"Copper, Steel and Bank-note Engraving," "Book-binding" and the old Southern industry of "Manufacturing Indigo." A description of "Willner's Sail-wheel Flying Machine" is accompanied by illustrations which add greatly to its instructiveness. Bela Hubbard takes for a subject "The Lesson of the Forest Fires," and contributes a highly interesting article. Perhaps the most interesting psychological article is the one on "The 'Mutual Aid Society' of the Senses," by Dr. S. Millington Miller.

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The political discussions in the March *North American Review* are opened by Congressmen Tracey, of New York, Storer, of Ohio, Patterson, of Tennessee and Cousins, of Iowa, on the question "Is an Extra Session Needed?" In connection with these the short article on "Past Extra Sessions" by Charles M, Harvey is of special interest. "Two Years of Democratic Diplomacy" is the title of a vigorous article by Senator Cushman K. Davis. The article by the Hon. R. P. Bland, Chairman of the Committee on Coinage in the last Congress, on "The Future of Silver," is of more than ordinary interest just at this time. Henry Wallman one of the best known of the alumni of the U. of M. Law School in the west writes upon "The Danger of the Federal Judiciary" in his usual, forceful manner.

# MICHIGAN LAW JOURNAL.

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## *LEGAL EDUCATION: ITS RELATION TO THE PEOPLE AND THE STATE.**

H. B. HUTCHINS.

All callings are to a greater or less extent interdependent. One should not be fostered at the expense of another, yet any improvement along a given line is more than local and immediate in its influence. It reaches more than those who are directly concerned. The building up and perfecting of a single industry may add to the wealth and importance of its promoters, but to argue that they are the only beneficiaries, would be to leave out of the case all of the indirect results that naturally and inevitably flow from a very successful undertaking. The fostering of an enterprise by the shutting out of foreign competition, can only be justified upon the theory that the people as a whole are benefited thereby. Reference to specific example would hardly be necessary to emphasize this idea, if we were to confine our inquiries to the business world or to the industries, for here the fact is constantly recognized and of necessity must be made an element in every important problem. But I am not so sure that laymen, or any considerable portion of them, realize that the principle applies with equal force to the learned professions, so called. That every man, whatever his calling or walk in life, is interested, for example, in sound legal education, because thereby professional standards are raised and greater professional excellence secured, would not, I fear, receive a ready assent in many quarters. But I venture the assertion that it is not only the duty of every citizen but that it is for his interest to do all that lies in his power to forward any well considered movement that has in view the raising of the

*Read by Professor Hutchins, Dean-Elect of the University of Michigan Law School, at the last meeting of the Michigan Political Science Association.

standards for admission to the legal profession. It is a duty that he owes to the State and to himself, a duty that springs from his citizenship, but it is one that he can well perform if we consider it solely from a selfish and pecuniary point of view.

In the discussion of this question, it is not necessary that I should make extended reference to the close and intimate relation that of necessity exists between lawyer and client, and to the fact that the confidences imposed demand in all cases a high sense of professional responsibility and in many the best intellectual and professional training. To the trusted legal adviser as to none other, unless to the father confessor, are opened the gateways of the innermost recesses of the human heart; to him are revealed the motives and purposes of men. Family secrets and business confidences are freely committed to his keeping. Upon his learning and judgment the success or failure of great enterprises may depend. And to his skill and industry the client may owe his rights, his freedom or even his life. Every intelligent man, of course, understands the intimacy of the relation and appreciates the importance of intellectual and well-trained counsel when he himself is immediately concerned. "But," he may argue, "sound legal education and high professional standards are matters of indifference to me, for whatever be the state of legal learning, men will be found who by force of industry and high intellectual gifts and acquirements have lifted themselves above the common level and are fitted for the most important professional engagements. Every business center has them, and in numbers sufficiently large to supply the ordinary demand." This argument fails to recognize the uplifting of the profession generally that must necessarily come with the raising of the professional standards. It assumes that the lawyer of learning and ability will be equally learned and equally capable whatever his professional surroundings. The weakness of the assumption is, of course, apparent. Further, it fails to take into account the fact that matters of detail and preparation must be delegated very largely to subordinates, and that the skill and dispatch with which such work is accomplished must depend upon the training of the men to whose hands it is committed. It can be truly said that the progress of the law should mean "the progress of the lawyer, not of a few talented men who are on the outposts of legal thought, but the great army of the commonplace who constitute the majority in every occupation."

But extended argument along this line cannot be necessary. That the man of affairs, who must frequently seek the profession and

the courts for the protection or enforcement of his rights, is immediately interested in the raising of legal standards, goes without saying. The majority of the people, however, are not litigants. Many, a large number indeed, never have occasion for legal aid. The discussion, therefore, must be upon a broader basis than that which has to do with individual cases merely, if we are to prove our thesis that the raising of the standards of legal learning should appeal directly to every citizen.

The American system is emphatically a government by the people. Subject only to written constitutions, all political power rests with the people; they are the arbiters. The citizen is not interested in results alone; he is an active factor. To what extent this is so he often fails to realize. In the first place, he enjoys a practically unqualified and unrestricted elective franchise. Freedom of speech and of publication are accorded to him as in no other country. Members of the state legislatures and of the popular branch of Congress are elected by the people directly, as are the governors and the more important executive officers of the different states. It is practically correct to say that the legislative and executive departments in state and nation, are immediately in the hands of the people. The national executive, to be sure, is in form selected by the electoral college, but in reality he is chosen by the popular vote of the states. And the membership of the United States Senate is but a single step removed from immediate popular influence. With few exceptions the judicial offices, both high and low, of the different states are elective. The tenure of the elective office, moreover, in all departments is such as to give frequent opportunity for the expression of the popular will. That a government so thoroughly subject to the practically uncontrolled power of the people has passed the experimental stage, that it has shown itself equal to foreign complications and to the shock and discord of civil strife, that it has been able to grapple with the problems incident to our enormous increase in population, problems made the more difficult by the diverse foreign element that has so largely contributed to that increase, that the many and complicated questions growing out of our marvellous material growth and devevopment and the consequent inequality of pecuniary and social condition have not brought disaster, that contrary to prediction, we have never been wrecked by "a distressed and discontented majority," indicate the presence not only of creative but also of conservative energy to a marked degree. And where is this conservative energy? Not wholly, I am sure, in the checks and balances that our written constitution pro-

vides. That instrument has been described by Macaulay as "all sail and no anchor," and if we consider it simply as an isolated document, leaving out of the case judicial and practical interpretation and the national character that has been developed under it, the representation is not, perhaps, inapt. But in his gloomy prophecy as to the future of our institutions, this distinguished Englishman fails to recognize in the American people an underlying stratum of conservative good sense that surely exists and that has thus far proved to be an anchor sure and steadfast. That this stable element is the sole contribution of any single calling or profession, I would not for a moment claim; but that its presence is due in a very large degree to the influence of the American bench and bar, must be at once apparent to the careful student of our history and current events.

The inevitable tendency of the practice of the law or of service upon the bench is in the direction of a cautious conservatism. All of the traditions of the profession inculcate it. Nowhere is the respect for precedent and for a well ordered stability more sacred. The lawyer lives in an environment of conservatism. He takes it in with the principals of the common-law, and it becomes a part of his very being. He realizes as does no other person that an established order of things is essential to the highest rights of the individual, and further, that the primary function of a free government is the protection of the individual. That in some cases and under some circumstances this tendency operates unfavorably, is undoubted, but that its effect as a whole is to contribute an element of stability that has thus far proved a safeguard to the individual and to the state can be shown beyond question. De Tocqueville, a most intelligent student of our institutions, says: "I cannot believe that a republic could subsist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people," and again he observes that the legal profession in the United States is "qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government."

Few persons probably realize the extent of the influence upon public questions exerted by this body of conservative men. The influence is, of course, most apparent in the judicial department. The judges as a rule are lawyers, and it is not too much to say that their selection and continuance in office are practically in the hands of the bar. No man can hope for a judicial career who lacks the confidence and respect of the profession. And, further the reciprocal influence of bench and bar are productive of the most important

results. Whatever is decided by a court of last resort, after a full hearing and consideration, is accepted and acted upon by the bar as law; and this is so even where long cherished political theories are swept away and political purposes thwarted. It is to the bar on the other hand that the bench looks for instruction and support. It has been truthfully said that "no decision which the profession as a whole does not accept as sound can hold a permanent place in our law." Indeed what the lawyers pronounce against generally, has little chance of receiving even temporary recognition in the courts. The influence of which I speak is at once apparent to the intelligent student of our institutions. Among the causes which have sustained the authority of the judiciary, Mr. Bryce in his masterly work on "The American Commonwealth," mentions the strength of professional feeling among American lawyers, the relation of the bench to the bar and the power of the legal profession in the country. "The keen interest," he says, "which the profession takes in the law secures an unusually large number of acute and competent critics of the interpretation put upon the law by the judges. Such men form a tribunal to whose opinion the judges are sensitive, and all the more sensitive because the judges, like those of England, but unlike those of continental Europe, have been themselves practicing counsel. The better lawyers of the United States do not sink their professional sentiment and opinion in their party sympathies. They know good law even when it goes against themselves, and privately condemn as bad law a decision none the less because it benefits their party or their client . . . . . As the respect of the bench for the bar tends to keep the judges in the straight path, so the respect and regard of the bar for the bench, a regard grounded on the sense of professional brotherhood, ensure the moral influence of the court in the country."

The simple fact that we have in our midst this army of men, which a conservative estimate places at more than eighty thousand, whose business it is to deal with the rights of the individual under the law, and who are peculiarly fitted for leadership in public affairs, is itself a matter of prime importance in any attempt to account for the conservative force of our people; but the full significance of the influence of the bar upon the bench and of the bench upon the bar and of both upon the whole country is only apparent when we consider the controlling power which under our system may be exercised by the judiciary over legislative and executive action. The duty to pass upon the validity of legislative acts may devolve upon

any court of any grade. Federal legislation may be questioned in a state court and state legislation in a federal court. I need not suggest that this power is unique and peculiar to our system. Without it, however, the government as formed must have been a signal failure. While this authority has always been exercised with caution and never unless manifestly necessary, it has often interposed to correct the mistakes of an excited and unreasoning majority. It is this which has kept us within the limits marked out by the organic law. This it is which has proved a bulwark for the protection of private rights. Between the years 1790 and 1893, the Federal Supreme Court held twenty acts of Congress and one hundred and eighty-two acts of state and territorial legislatures to be unconstitutional. (a).

As to the number of state acts that have been held unconstitutional by state courts of last resort, I am not prepared to give definite information. Considering the wide range of state legislation, however, particularly in recent years, and the growing tendency to foreclose individual rights by legislative action, it is safe to assume that they have been numerous. But the influence of which I speak is by no means confined to the striking from our statute books of unconstitutional enactments. It is even more effective when applied to the construction of the organic law and of valid legislation. In a single volume of the Federal Supreme Court Reports, which I take up at random, twenty-five of the one hundred and forty cases reported are upon the construction of statutes. Fifteen statutes of the United States are here construed and nine statutes of as many different states. In another volume, also taken at random, of the one hundred and twenty-two cases reported, the subject matter of twenty-three is the construction of statutes either state or national. In a single volume of the reports of the Court of Appeals of the state of New York, taken in the same way, of the two hundred and eighty-five cases reported, twenty-eight are upon statutory construction. And in a volume of the Michigan Supreme Court Reports, which I take at random, thirty cases involve statutory questions. And so I might go on. Every lawyer understands, and even a cursory examination will convince the layman, that a very large part of the time of the profession and the courts is given to explaining, qualifying and

(a) For this information as well as for all statistical data contained in this paper, bearing upon the influence of the profession in public affairs, I am indebted to the published address of Mr. J. H. Benton, Jr., delivered before the Southern New Hampshire Bar Association, Feb. 23, 1894. The statistics in regard to the profession and its influence which Mr. Benton has gathered and published in the form of appendices to this address, cover a wide range. They are, so far as I know, the most complete and accurate contribution yet made upon the subject.

limiting legislative enactments. But it is in the construction of the organic law that the people as a whole are most immediately interested, and I need not suggest that the performance of this duty calls for the exercise of the highest functions conferred upon the American judiciary. The Federal Supreme Court has been described as "the living voice of the Constitution," and the description is not exaggerated. Indeed, it is hardly extravagant to say that the fundamental law, as it exists today, is practically as much the work of that tribunal as of the convention which gave the Constitution form. Take the work of Marshall and his colleagues and successors out of the Constitution, and you take from it that which has made it a vital organism. It is the judiciary aided and guided and supported by the learning and constant conservatism of the bar that has adapted that instrument to the changing necessities of our changing civilization. It is this force that has developed the Constitution and at the same time kept the fierce struggles engendered by selfish interests within constitutional limitations. If the experience of the century has taught one lesson more thoroughly than another, it is that without the molding and restraining influence of a learned and conservative judiciary, government under written constitutions must in the end prove a most dismal failure.

If we turn to the legislative and executive departments of the government, we find that the influence of the profession has from the first been an important factor. Of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers. The convention which framed the Federal Constitution contained fifty-five members, and of these thirty were lawyers. And notwithstanding the unpopularity of the profession during the years immediately after the war for independence, an unpopularity due to the practical suspension of the administration of justice during the conflict, the general indebtedness of the people, the consequent activity of the courts and the hardship that almost invariably followed any attempt to enforce any claim by legal process, ten of the twenty-nine senators and seventeen of the sixty-five representatives in the first Congress of the United States were lawyers. From that time to the present, almost without exception, the proportion of lawyers to the total number has increased in each Congress. In the present Congress, of the eighty four senators, sixty-seven are lawyers, while two hundred and twenty-two of the three hundred and sixty-two representatives are from the legal profession. The entire membership of the Senate has been three thousand one hundred and twenty-two, and of these two thousand and sixty-eight have been lawyers. The entire membership of the House has been eleven thousand eight hundred and

eighty-nine, of whom five thousand eight hundred and thirty-two have been lawyers. According to Mr. Benton, the average membership of lawyers in both branches of Congress from the beginning has been fifty-three per cent., and the average membership in the Senate during the past thirty-five years has been from seventy-five to eighty per cent. (a). An examination of Mr. Benton's tables will show that the membership of the profession in the state legislatures has been conspicuously large when compared with the proportion of lawyers to the male population. I cannot go into this matter in detail, but will simply call attention to the membership of last year in a few of the larger states. In California the proportion of lawyers to the male population was one in two hundred and seventy-three, and the proportion in the legislature was one in four. In Illinois, one in three hundred and ninety-four of the male population and one in four of the legislature were lawyers; in Massachusetts one in four hundred and sixty of the male population and one in six of the legislature; in Michigan, one in four hundred and eleven of the male population and one in six of the legislature; in Missouri, one in three hundred and eighty-eight of the male population and one in five of the legislature; in New York, one in two hundred and sixty-five of the male population and one in four of the legislature; Pennsylvania, one in four hundred and twenty-eight of the male population and one in five of the legislature; in Texas, one in three hundred and ninety-seven of the male population, and one in two of of the legislature.

But in estimating the influence of the profession throught our legislative bodies, we should not forget that it cannot be measured by reference to a numerical basis simply. By his training and his life the lawyer is fitted for leadership. More frequently than men from other callings he is found at the head of important committees. The membership of judiciary committees is very largely confined to the profession. As a rule the lawyer is a man of affairs and a ready debater. His associates who are drawn from other walks of life expect him to take the initiative, and naturally look to him for guidance. Even when not a member, he frequently appears in a semi-public capacity to advocate or oppose pending measures. Indeed it is hardly an exaggeration to say that his influence is predominant in matters of general legislation both state and national.

And the impress of the profession is not less marked upon the organic law of the states. It is a well known fact that the member-

(a). See Appendix III. to Mr. Benton's Address.

ship of constitutional conventions from the first has been made up largely of lawyers, and that their influence has been to a large extent controlling. I will not burden you with details in this connection, but will simply suggest that in the constitutional convention recently held in the state of New York, out of a membership of one hundred and seventy-five, one hundred and thirty-three were lawyers, and that many leaders of the bar from different parts of the state gave their individual energies to the work.

The history of the personnel of the executive department of the government, both state and national, shows a large representation from the bar. Nineteen of the twenty-four presidents have been lawyers. Seventeen of the vice-presidents have been lawyers. Two hundred and eighteen of the two hundred and thirty-two cabinet officers have been lawyers. And considerably more than half of the governors of all the states have come from the legal profession. I have neither the time, nor is it necessary, to refer to the powers and privileges of the executive department. Suffice it to say that they are such as to give a large degree of liberty and a broad field for the exercise of individual discretion in official action. That the conservatism of the profession has borne its legitimate fruit here as elsewhere, cannot admit of doubt.

But we must look beyond the court, the legislative hall and the executive chamber, if we are to measure the full influence of the of the American lawyer on political affairs. His great field, after all, is at the very source of political power; it is among the people. His influence here is direct and all the more effective because scarcely perceived and rarely counteracted. It is constantly at work in connection with the every-day affairs of life. It reaches all classes and grades of society. It tempers and restrains because it inculcates a respect for law and for an established order of things. It is the greatest of our conservative forces and a continuing safeguard.

If further argument were necessary to show that the question of legal training is one of vital importance to the state and one that should appeal directly to every citizen, it is to be found in the fact that a poorly equipped bar or judiciary entails a great and needless expense not only upon litigants but upon the public as well. Every attempt at reform in this direction deserves active encouragement, even when considered solely from an economic point of view. The half-educated and superficial lawyer is a public burden; the unscrupulous one is a public curse. Such men obstruct legitimate business and flood our tribunals with profitless and vicious litigation. Every

good lawyer understands that no inconsiderable part of the time of our courts is taken up with contests that ought never to have taken form and that are traceable directly either to professional incapacity or to a low standard of professional integrity. The evil is demoralizing, far-reaching, expensive; the remedy is apparent.

I have attempted thus far to show that the functions of the American lawyer cannot properly be measured by the duties which spring from the merely personal relation of attorney and client. He is more than a hired advocate. He is an essential part of the machinery of government. His influence upon the jurisprudence and legislation of the country is practically omnipotent. He is the natural leader of the people. If I have succeeded in making out my case, it follows logically that his education is a matter of public concern. That this is so in regard to his professional training, is recognized by the state when it provides for fixing requirements for admission to the bar. A further recognition is found in the fact that in many of the states, facilities for legal training constitute a part of the public educational system. But has the public, through the instrumentality of the state, done its full duty in this regard? An answer to this question necessitates an examination not only of the present opportunities for legal training, but, also, of the education required as a preparation for legal study.

As preliminary to that inquiry, however, it is proper, I think, to anticipate an objection that might possibly be urged against any change in the present methods. "Why," it may be asked, "if the profession has served so useful a purpose in our political life, furnishing, as it has, a constant safeguard to constitutional liberty, should present educational methods be criticized and changes suggested? Have you not by your own showing advanced the strongest possible argument against any change?" Certainly not. The legitimate deduction from the facts is that the profession, under our system of government, is an essential part of our public life, that it must mould public opinion, that it must shape legislation, that it must be the controlling factor in the decision of constitutional questions and in the construction and application of the law. That being the case, the best possible preparation for these important public functions should be the first requisite. That they have been fulfilled in the past by an indifferently educated profession, and on the whole fulfilled creditably, is certainly no indication that better results would not have been realized under higher standards. We must remember too, that the past century has been with us to a very

large extent a formative period. Many of the public questions have been novel and of vital importance, and have been such as to stimulate thorough and extended investigation. Private demands upon the profession, moreover, have not been so great or so varied as at present, and it has been possible, therefore, for the lawyer to supplement defective training by a special study of political and economic questions. And then, too, it must be remembered that what was a sufficient preparation for the past is not necessarily sufficient for the present or for the future. The complicated questions growing out of our modern civilization and our modern political and business methods call for the highest general and professional training. If the American lawyer is to meet in future the full measure of responsibility that his position as a leader among the people casts upon him, it will only be through the raising of preparatory standards and the development of the higher jurisprudence.

Coming now to the question of the duty of the state in regard to the matter of preliminary training for the bar, I beg to call your attention first to the fact that probably in no civilized country on the globe, certainly in no European country, are the requirements for the admission to the study of law so low as in our own. In no European country is the required preliminary training of the lawyer for his public functions so utterly neglected as in our own. In Continental Europe what is the equivalent of our collegiate education is a necessary prerequisite to professional study, and the only road to the bar is through the university, which is a professional school for the four learned professions—law, medicine, theology and philosophy. In England, while a college or university education need not necessarily precede professional study, yet if the candidate is not a university graduate or has not, by examination, brought himself within certain excepted classes, he must show his fitness for legal study by passing a satisfactory examination in the "English language, the Latin language and English history." Such examination is conducted by a joint board appointed by the four Inns of Court. Although it is possible in England for a man of very moderate acquirements to enter the lower grade of the profession, and although such a man occasionally attains the rank of barrister, yet there is an unwritten law recognized by the public and the bar, that the barrister should be a university man. For the highest success at the English bar, a university education is regarded as an essential. A lesson may, indeed, be learned from the English dependencies on this side of the Atlantic, where at least an academic education must precede legal study. Understand that I am no advocate of servile

imitation, that no method would have my support simply because it is foreign. We have a work to do, and I believe most thoroughly in doing it in our own way. But I believe in doing it intelligently. In my judgment it would be an act of supreme folly for us to shut our eye to a lesson of mature experience simply because it is foreign.

It is practically correct to say that admission to the study of law in this country is not limited by educational restrictions. Here where the public functions of the lawyer make him an essential part of the machinery of government, he need not of necessity lay a foundation for his public duties by any general acquirements. I am sorry to say that this is emphatically true in the State of Michigan and in most of the western states. That the bar has among its membership many men of wide general learning and that perhaps the majority have at least the basis for a general education, I, of course, recognize. It is to its credit that this is so. But the inconsistent fact remains that preliminary training is not a requisite. I think I appreciate the difficulity of the situation. I need not be reminded that some of the brightest lights at the American bar have had as a basis for their life work only the merest rudiments of a preparatory education. Nature makes some men for lawyers, and with such, defects in training apparently count for little. It may even be admitted that the learning of the schools may occasionally prove a positive detriment. A native ruggedness that gives strength may be lost in the refining process. But exceptional cases should not control. And besides a reasonable educational requirement at the present time and in a state like Michigan, where the opportunity is at the door of the rich and poor alike, could rarely work a hardship. The time has not yet come, although I trust it is not far distant, when a college education can be made a requirement for professional study. But, in my judgment, the time has come when every state should take upon itself the duty of fixing and systematically testing the qualifications that the candidate for legal study must possess. In a few states this has already been done. In the state of New York, for example, the whole matter of admission is under the control of the court of last resort. Every law student is required to pass prescribed preliminary examinations that are held under the direction of the Regents of the State University. It should be explained that the University of New York is not a university in the commonly accepted sense of that term, but rather an organization for the supervision and control to a certain extent of the educational system of the state, one of its functions being the conducting of examinations and the grant-

ing of certificates and diplomas. These examinations are held in different parts of the state, and those for law students embrace at the present time the following subjects: English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics. Substantial equivalents, as fixed by the regents, may be offered. The successful candidate receives from the board what is known as the "law student' certificate," which he must forward to the clerk of the Court of Appeals, who files it and returns a certified copy. This copy is used by the candidate, when he applies for admission, as proof that he has complied with the rule as to preliminary requirements. Every law student, unless he be a graduate of a college or university of recognized standing, or unless he has completed a full year's course in such college or university, or unless he has completed a three years' course in some educational institution recognized by the Regents as maintaining a satisfactory academic standard, or unless he has a Regents' diploma, must pass these examinations either before, or within one year after, he begins the study of law. That the student comes within some one of the exceptions must be shown by a properly authenticated certificate. This plan with some changes and some additions to the subjects required has been in operation in the state named since 1882. The rule has been strictly enforced, and the results have been most satisfactory. The profession and the public have been in a measure protected. The credentials of an admitted attorney may now in that state be taken as representing some preliminary training and preparation for professional work. The plan, however, is still subject to criticism. There is no good reason, in my judgment, for giving the student a grace of one year after beginning the study of law, in which to pass these examinations. The period of legal study preparatory to the bar examination is fixed at three years, all of which time should be given to that work. The preliminary study and examinations should be preliminary in fact as well as in name.

In one or two other states there are regulations more or less stringent in regard to the preparatory training, but in none, I think, is the scheme on the whole so well devised and so thoroughly enforced as in the state of New York. I do not refer to the New York plan for the purpose of urging its adoption in the state of Michigan, but rather to show that the matter of preparatory training for legal study has received serious consideration in the former state and that practical results of great value have been realized. I do, however, urge the

adoption in this state of some plan. The time is ripe for it, and the necessary conditions are not wanting. With her unrivalled educational facilities, Michigan is prepared to take a marked step in advance. I have not time to formulate details, nor is this the occasion for it. I will simply suggest that a preliminary training equal to that required for entrance to one of the under-graduate courses of the university should, in my judgment, be fixed as a necessary prerequisite to the study of law. The examinations should be under the direction and control of the educational department of the state, and could easily be conducted in connection with the high school system of the state.

"But," it may be said in reply, "this is a matter for the law schools of the country and not for public action." There would certainly be force in this suggestion, if legal education were exclusively in the hands of the schools. Under such circumstances, there would be no hesitation on the part of the law school authorities. As it is, the preliminary requirements of the schools, the country over, are much in advance of those of the state. It must be perfectly apparent that the schools are seriously handicapped so long as a short cut to legal study through the offices is possible.

As introductory to a few suggestions upon the excellencies and defects of our system of legal education, separately considered, I beg to call the attention of the Association to the fact that in this and many other states no period of preparatory legal study is fixed by law, and further to the lack of uniformity in examinations for admission to the bar. The law teachers of the country, who through their experience are probably better fitted than others to give an intelligent opinion upon the subject, very generally agree that a period of three years in the schools for the average student is none too long. If they are right in this, an equal period, at least, should be exacted of the student in an office, where the opportunities for thorough and systematic study are necessarily inferior to those furnished by the schools. A want of uniformity in the period of study is certainly a defect, but not so serious a one, as the other to which I refer. Under the system now in force in this state, the student may be admitted by the Supreme Court or by a Circuit Court. In either case he must show his qualifications by an examination in open court. This examination is usually conducted by a committee of lawyers appointed by the court. Unless the practice has changed during my absence from the state, this committee is not generally appointed for a definite time, but is made up as occasion may de-

mand. This, however, may not be the case in all of the circuits. The members perform this enforced duty without special preparation and without compensation. That the system is a lax one and bad in almost every particular, cannot admit of doubt. Even if there were a pecuniary inducement to make special preparation for the work, the temporary character of the committee would as a rule render such preparation impossible. Those who have not given attention to the matter, may perhaps be of the opinion that every lawyer of average ability is prepared to conduct an examination for admission to the bar without previous thought or preparation. He can certainly go through the forms, but the result in the majority of cases is anything but satisfactory. An examination so conducted rarely serves the purpose of testing fairly the applicant's knowledge. The busy practitioner is from force of circumstance in a sense a specialist. As a rule his investigations are defined by the demands of his cases. His ordinary studies are of necessity from the practical side. His legal investigations are for an immediate purpose, and that purpose rarely calls for a scientific study and review of the different departments of the law. Such being the case, his examination, if he enters upon it without thought or preparation, as he ordinarily must under the present system, naturally runs at once into the field of his most recent investigations. The almost inevitable tendency is for him to measure the acquirements of the student by his ability to respond along this particular line of inquiry. I do not mean to say that this is always the case, but that the tendency is in this direction. The result of such an examination may be an injustice to the student or the admission of one not entitled to the privilege. The entire want of uniformity in the examinations in the different courts is equally unfortunate. Under the present system, indeed, there is not only a want of uniformity in the different courts, but in the same court, for with a change of examiners a change in the character of the examination almost inevitably follows. The result of all this is that different standards exist in different parts of the state and at different times in the same locality. The examination may be little more that a form in one court, while in another it may be unreasonably severe. The law teacher probably realizes more keenly than the practitioner the disadvantages, to say nothing of the positive injustice, that result from the present plan. The remedy that I beg to suggest is that the examinations for the whole state be committed to a single board of paid examiners, say three in number, the term of office to be three years, to be selected from practitioners of experience and standing, and the appointments to be so regulated that there may be always upon the board men

of experience in the work. The board should be appointed by, and be under the immediate direction and control of the supreme court. They should hold examinations at stated times in different parts of the state, and admission to the bar by the Supreme Court or by a Circuit Court should be only upon their recommendation. The expense incurred could be largely and, perhaps, entirely met by the fixing of an examination fee to be paid by each applicant. Among the minor advantages of this scheme would be this, that in time it would furnish in one place a complete list of the membership of the bar, which, I believe, is not secured under the present system. It would, moreover, serve to center and fix responsibility for the learning and character of the profession of the state. I beg to call your attention to the fact that the suggestions that I make contemplate that the control and direction of bar examinations should continue to be in the hands of the court and the profession. I do not urge that they be made academic.

A plan somewhat similar to the one outlined has stood the test of experience in England, and through the efforts of the State Bar Association and the law teachers of the state of New York, a like scheme was last year adopted there.

So far as opportunities for the purely technical and professional training for legal practice are concerned, but little need be said in the way of criticism or suggestion. Although the student is not obliged here as in continential Europe to seek that training in the university, the work of fitting young men for the profession is now very largely carried on by the schools. The first law school in the United States was established in Litchfield, Conn., by the Honorable Tapping Reeve, in 1782, and for several years it was the only one in the country. The total number of the law schools in the United States at the present time is seventy-two. Fifty-one have been organized since the close of the civil war, and of these fifteen have been organized since 1890. In 1889 there were in attendance upon the schools three thousand nine hundred and six students, while the attendance in 1894 was seven thousand eight hundred and sixty-three. These figures are significant. They show the growing tendency of our young men to seek the regular and systematic instruction of the schools. The law schools of the country are as a rule in good hands. Their work is a quiet one, exciting little public attention, but it is productive of great results. "I do not know," says Mr. Bryce, in speaking of our law schools, "if there is anything in which America has advanced more beyond the mother country than in the provision

she makes for legal education. Twenty-five years ago, when there was nothing that could be called a scientific school of law in England, the Inns of Court having practically ceased to teach law, and the universities having allowed their two or three old chairs to fall into neglect and provided scarce any new ones, many American universities possessed well equipped law departments, giving highly efficient instruction. Even now, when England has bestirred herself to make a more adequate provision for the professional training of both barristers and solicitors, this provision seems insignificant beside that which we find in the United States, where, not to speak of minor institutions, all the leading universities possess law schools, in each of which every branch of Anglo-American law, i. e., common law and equity as modified by Federal and State constitutions and statutes, is taught by a strong staff of able men, sometimes including the most eminent lawyers of the state. . . . . No one is obliged to attend these courses in order to obtain admission to practice . . . . . But the instruction is found so valuable, so helpful for professional success, that young men throng the lecture halls, willingly spending two or three years in the scientific study of law which they might have spent in the chambers of a practicing lawyer as pupils or as junior partners." He refers to the indirect results of this theoretic study as of great value "in maintaining a philosophical interest in the law among the higher class of practitioners and a higher sense of the dignity of their profession." (a).

In regard to our system of legal instruction, I have but a single suggestion to make. We should seek to teach more than simply the mechanical trade of the lawyer. It has been truthfully said that "a danger to the standing of the profession lies in the tendency of our law schools to frame their courses of study with a view to the mechanism rather than the science of the law." Practical instruction, of course, we must have and in amount sufficient for the practical demands that are sure to come. But we should not forget in the development of our courses that the historical and scientific element is quite as important. The practical work of our schools should rest upon a historical basis. It has been said that it is history which teaches us what the law is. This may not be strictly true, but it certainly is true that without a knowledge of what the law has been, we cannot know thoroughly what the law is. The tendency of many of our schools to devote attention simply to the present and the

(a). American Commonwealth, Vol. II., p. 503.

practical, has undoubtedly come very largely from the crowding of the work into too short a period of time. With the lengthening of courses we may hope for a change. But this is a problem that the profession and the schools must solve, and let us hope that the solution will be such as to place the study of law in the United States upon a thoroughly scientific basis. If this and the other reforms suggested can be accomplished, much will have been done in the way of lifting the profession above the grade of a mere calling and fitting it for the grave public duties that it must, of necessity, assume.

# CAN THE PRESENT JURY SYSTEM BE IMPROVED.

PROF. B. M. THOMPSON.

There is unquestionably much dissatisfaction with the quality of the modern jury, and with the character of its work. Since juries are composed of men possessing finite intelligence, at best, we ought not to expect that their verdicts would show evidence of infinite wisdom. But the most charitable, who do not expect the impossible are often disappointed at the quality of the possible. All this goes without saying and consequently the question is often discussed, how can the system be improved?

We suggest the following changes. None of them are revolutionary, although a few may be regarded as somewhat radical.

*First;* Reduce the pay of jurors from two to one dollar per day. Two dollars is not sufficient to induce the best men to serve for the pay and is sufficient, especially in cities to be attractive to a certain class who are indesirable. One dollar per day will cover a juryman's actual expenses and no more and he will thus be giving his time to the public service. We shall at once by this change rid ourselves of the professional juryman and make the position more attractive to the men whose services we seek to obtain.

*Second;* Reduce the number of the jury in all civil suits from twelve to six. The unanimous verdict of six intelligent men of character and ability is all that parties litigant ought to demand—and if jurymen are to serve, practically, without compensation such service should be made as light as practicable and subserve the ends of justice.

*Third;* No general verdict, except in actions founded upon tort, to be rendered. In all other cases the jury to render a special verdict in answer to interrogatories to be prepared and submitted to them by the litigants under the direction of the court, and upon the special verdict so found the court to render judgment. Under this system the jury would be exclusive judges of fact and questions of law would be left exclusively to the court.

*Fourth;* All suits involving less than two hundred dollars, over and above all set offs, to be tried by the court. At least one half of all the causes tried in the circuit courts belong to that class. At the

present time the cost of a jury to the taxpayers of each county is at least fifty-four dollars per day while the jury is in attendance, made up of forty-eight dollars pay of twenty-four jurymen and six dollars pay of two officers in attendance. I think if we had access to the exact facts we should find that the actual cost to the taxpayer in furnishing a jury in this class of cases exceeds the amount involved. I do not question the right of litigants to play for small stakes, nor indeed their duty to do so in very many cases. But I submit that, so far as the public is concerned there is no principle involved, and when from a pecuniary standpoint, the game is not worth the candle the taxpayers should not be required to furnish any more light than is reasonably necessary.

I have not made any effort to elaborate the arguments in favor of these several changes nor indeed to so much as to enumerate them. Neither have I indicated at all in detail the proper practice and proceedings in case these changes were made, that being mere matter of detail.

The primary object of any change should be, of course, to better the situation, but it is not unworthy of mention that the changes suggested would save the taxpayers of the state over $100.000, per annum, a very pretty penny.

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## *NOTES.*

MICHIGAN STATE BAR ASSOCIATION.—The Board of Directors of the Michigan State Bar Association met at Lansing, on Tuesday April 30th, and arranged a program for the Annual Meeting to be held in Lansing on the 25th of June. There were present:—Hon. M. V. Montgomery, President; Eli. R. Sutton, Secretary; Alfred Russell, S. T. Durand, Geo. W. Weadock, Justice Brown, Dallas Boudeman, Judge Howard, Judge Cahill and O'Brien J. Atkinson.

The program for the annual convention as perfected, comprises papers by Alex. R. Avery of Port Huron, J. Newton Fiero of New York. J. A. Boyd, Chancellor of Ontario, and Benton Hanchett of Saginaw. Preparations will be made for entertaining the American Bar Association which is to meet in Detroit during the month of August. In the evening a banquet in honor of the Supreme Court Justices and guests of the Association will be served at the Downey House.

The JOURNAL takes this opportunity to urge upon the members of the Association and of the profession generally, the importance of attending this session. Assuredly the convenience of members composing our state bar is admirably suited in point of both time and place selected for the meeting. A majority of the states are fortunate in the possession of active and well supported bar associations, but Michigan, with a bar of admittedly superior standing, has shown amazing apathy relative to the maintenance and expansion of such an important organization. It is the most excellent means at the command of members of the profession throughout the state, for weaving a bond of fraternal communion that shall be valuable as a source of business profit, as well as a medium for the cultivation of social intercourse. Every lawyer in the state should not only become a member of the Association, but should manifest an active interest in its development and perpetuation.

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THE NEGOTIABILITY OF PAPER PAYABLE WITH EXCHANGE.—It is an unfortunate but a necessary consequence of our system of jurisprudence that different and conflicting rules become established in the

various state courts. It is especially to be regretted that commercial paper does not form an exception to this rule, because like money, which it is coming to represent more and more, it should everywhere have the same value and be governed by the same laws. The Iowa case of *Culbertson v. Nelson, 61 N. W. Rep. 854*, is an example of the conflicting views taken by the courts of the different states on this subject. It was there held that "a bill of exchange for the payment of a certain sum with exchange" was not negotiable. The authorities, which are well collected in the opinion, are in great conflict on this point. The view of the Court is sustained in the following cases: *Lowe v. Bliss, 24 Ill. 168; Bank v. Strother, 28 S. C. 504; Bank v. Bynum, 84 N. C. 24; Fitzharris v. Leggatt, 10 Mo. App. 529;* while the opposite conclusion has been reached in *Smith v. Kendall, 9 Mich. 242; Johnson v. Frisbie, 15 Mich. 286; Morgan v. Edwards, 53 Wis. 599; Hasting v. Thompson (Minn.) 55 N. W. Rep. 968; Bradley v. Lill, 4 Biss. 473; Price v. Teal, 4 McLean 201*; *etc.*

The Court said "the agreement to pay a certain sum.... with exchange" introduces an uncertainity as to the amount to be paid, which destroys the character and negotiability of the instrument as a bill of exchange..... This certainty must appear on the face of the paper, and not from anything dehors the instrument. The maxim, "Id certum est quod certum reddi potest," does not apply except the certainty required may be ascertained from the face of the paper."

On strict principle this reasoning is undoubtedly correct, but the uncertainty is more apparent than real. The reason of the rule is that the instrument should contain on its face the means of ascertaining exactly the amount due, but as the amount of exchange can be readily calculated at any time and usually bears but a very small proportion to the principal sum, a liberal construction of the rule is to be preferred to a strict, technical observation of it. Since the whole law of commercial paper is founded upon usage and custom, and it is now customary to treat such instruments as negotiable, it seems but proper that the courts should favor a liberal rather than a strict application of the rule.

It is curious to note that while the Supreme Court of Iowa has held that the stipulation to pay an attorney's fee for collection does not alter the negotiable character of a bill or note, (*Sperry v. Horr, 32 Iowa 184; First National Bank v. Dubuque S. W. Ry. Co., 52 Iowa 378*), the Supreme Court of Michigan, which upholds the negotiability of paper payable with exchange, denies the negotiability of such an instrument.

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THE VALIDITY OF AN ATTORNEY'S INTEREST IN A CAUSE OF ACTION AND THE RESULTANT JUDGMENT.—Modern decisions affecting the interest of an attorney, by contract, in a cause of action and in any judgment that may be entered thereupon, have become molded into a doctrine which recommends itself as a source of pro-

tection to members of the profession. Frequently an effort is made to annul such interest by virtue of a settlement, after judgment, between the parties litigant. But it is now a firmly established rule that a plaintiff may make a valid contract with an attorney, whereby the latter will acquire a definite interest which will not admit of annulment or diminution, providing notice of such interest be given to the defendant before settlement. In the matter of the complaint of Louis Washington, attorney, against the Chicago Tramway Company, a decree was recently entered which emphasizes the principles of this doctrine. The attorney and one Fanny Yancy entered into a contract, by the terms of which an action for damages was to be instituted against the Tramway Company because of physical injuries sustained by Yancy while riding in one of the Tramway cars, and further that the attorney should receive for his services and expenses forty-five per cent of such sum as the judgment might award on recovery. Accordingly suit was duly commenced, and judgment entered for $1700.00. The case was appealed by the defendant, and the attorney for the plaintiff served due notice on the appellant, of his interest in the judgment, which was affirmed by the Appellate Court. The case was then appealed to the Supreme Court, but prior to a hearing of the cause, the appellant settled with plaintiff by the payment of $1000.00, neither of the parties litigant paying the slightest heed to the attorney's claim. The attorney then filed a bill in chancery, which resulted in a decree ordering the Tramway company to pay him forty-five per cent. of $1700.00.

In *Frink v. McComb, 60 Fed. Rep. 486* the rule is enunciated that an attorney, by becoming aware of an assignment of the judgment by his client pending an appeal, is not bound to notify the assignees of his lien for charges, in order to retain the same. The case of *Willoughby v. Mackall, 21 Wash. L. Rep. 748*, holds that "a contract giving an attorney a lien upon the judgment to be rendered in a certain action, and such property as may be recovered of the adverse party, is not invalid because it does not identify the subject of the lien with sufficient certainty."

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IS IT ERROR TO ALLOW AN ATTORNEY OF ANOTHER STATE, RETAINED BY THE INTERESTED PARTIES, TO ASSIST IN A PROSECUTION.—Some very interesting questions have just been decided by the Supreme Court of North Dakota in the case of *State v. Kent, 62 N. W. Rep. 631.* The defendant in that case was convicted in the lower court of having murdered his wife and a reversal was sought on the ground that the inferior court erred in permitting an attorney from another state, who was retained by the relatives of the person murdered, to assist the prosecuting attorney on the trial. Also that the refusal of the trial judge to call another judge to try the case upon the affidavit of the accused that he could not have a fair trial by reason of the bias and prejudice of such judge, was fatal error.

The court held as to the first point that, though the control of criminal prosecutions in this country has been taken by statute from the hands of private individuals and transferred to public officers, that there is nothing to justify the conclusion that counsel employed by the interested parties may not assist the public prosecutor upon the consent of the trial judge. "The law has removed the criminal prosecutions from the control of private interests, but it has not excluded such interests from all participation therein. If no error is committed on the trial, we fail to see how an accused can be prejudiced by the fact that those personally interested have employed private counsel to aid the public prosecutor. Certainly, he could not be heard to complain of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into error. The best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. . . . . No decision can be found which questions the right of the prosecuting attorney to consult with, and receive all manner of aid, even during the trial, from counsel for private parties, outside of the court room. And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistance was employed by the public, or by private persons"? In support of its ruling the court cited the following cases: *State* v. *Helm*, (*Iowa*) *61 N. W. 246; Keyes* v. *State* (*Ind. Sup.*) *23 N. E. 1097; Polin* v. *State*, (*Neb.*) *16 N. W. 899; State* v. *Bartlett*, *55 Me. 220; State* v. *Fitzgerald*, *49 Iowa 260; State* v. *Wilson*, *24 Kan. 189.*

A different rule has been laid down in Michigan and Massachusetts under statutes very similar to those of Iowa. *Meister* v. *People*, *31 Mich. 99; Sneed* v. *People*, *38 Mich. 251; People* v. *Benis 51 Mich. 422*; *Com.* v. *Gibbs*, *4 Gray*, *146.* Judge Campbell in the leading case of *Meister* v. *People*, *supra*, took the view that the statutes removing the control of criminal prosecutions from private individuals to public prosecutors who are expressly forbidden to accept any fees or rewards for performing their duties, impliedly prohibit counsel employed by interested parties from assisting on the trial.

As to the question of the attorney being a nonresident of the state, the Court held that the North Dakota statute (Laws 1891, c. 119 s. 7) regulating the admission of attorneys to practice and which provides that " any member of the bar of another state actually engaged in any case or matter pending in any court of this state may be permitted by such court to appear and conduct such case or matter while retaining his residence in another state without being subject to the foregoing provisions of this act," places nonresident attorneys on the same footing as resident attorneys.

The second objection, however that the trial judge erred in refusing to call in another judge to try the case, was held to be fatal error. The word "may," in the statute was construed to be manda-

tory and not permissive, under the rule that when power is given to public officers to do certain acts for others which benefit them, that the authority is given to them not for their own, but for the benefit of those for whom there are called upon to act. The Court cited Sutherland on Statutory Construction, at page 597, to the effect that permissive words are "peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interests or the rights of third persons." The court also cited the cases of *Cutler* v. *Howard, 9 Wis. 309*; *Supervisors* v. *U. S. 4 Wall, 435 State Henning 54 N. W., 536.*

## *LEGAL MISCELLANY.*

A queer case is reported from Pittsburg. A mother left a child with a friend and agreed to pay for its board. She failed to do so, and when she demanded the child the demand was refused, the friend claiming to hold it as security. The court decided that the friend was entitled to the custody of the child until payment of the board.

A very close case, as well as a very important one to those interested in sales by agents, is the North Carolina case of *Coglate* v. *Latta*, *26 L. R. A., 321*, which decides that an order for goods sent by an agent to his principal for a consignee who signs it after the word "accepted," but where a blank for the name of the purchaser was left unfilled, and where there was no explicit statement of sale or purchase, can be shown by oral evidence not to constitute a purchase of all the goods named in the order. In this case there was oral evidence that some of the goods were intended for another person.

REFUSING BID AT SALE "WITHOUT RESERVE."—In *Boyd* v. *Greene*, *39 N. E. Rep. 277*, the Supreme Court of Massachusetts reviewed the question, whether on a sale at auction of real property announced as to be made without reserve, the inviting of a bid followed by a bid made accordingly, amounts if no higher bid is made, to a contract from which the auctioneer or owner cannot retreat, although no note or memorandum has been made under the statute of frauds. The court held that it was only at most an oral contract to make a contract which would satisfy the statute of frauds, and was not valid; although they apparently concede that an action would lie against the auctioneer or selling owner to recover damages for not keeping faith with the announcement.—*University Law Review*.

In a Cattaraugus (N. Y.) tar-and-feather case the other day the plaintiff's lawyer described his client's experience as follows: "And thereupon some persons then and there assembled applied a quantity of coal-tar to the person of the said Blowers, and after applying the said tar to various parts of his person . . . . afterward decorated, beautified and adorned the person of the said Blowers with a large quantity of hen feathers, worth to the value of $1. and after, and in other ways, and by other Christian and legitimate methods, remonstrated with the said Blowers for his evil practices, invited and urged the said Blowers to depart from the town of

Humphrey, which said Blowers then and there proceeded to do with great speed, scattering hen's feathers and dropping tar-coal and profanity at every jump.—*Green Bag.*

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RAILROAD ACCIDENT—NEGLIGENCE.—The Supreme Court of Indiana held, in the recent case of *Abbett, Admrx.*, v. *Lake Erie & Western Railway Company*, that where a car inspector is engaged in adjusting a coupler while a coemployee holds a torch, and the latter fails to warn the inspector in time to escape being crushed, the negligence, if any, of the coemployee cannot be attributed to the injured party; that a railway company cannot escape liability for wrongdoing by charging negligence against a coemployee of another road; that an employee at work under a car marked with signal lights has a right to rely on the usage which makes such a signal a warning to refrain from running any car against it; that where the evidence shows that neither the injured employee nor his coemployee were negligent, an instruction that if the helper was negligent no recovery could be had was inapplicable and properly refused, and that evidence that a switching crew, familiar with the rules, signals and markers, backed a car against another without signal or permission with sufficient force to lock the automatic couplers cannot be justified by custom, for the reason that such evidence indicates gross carelessness.—*Bradstreet's.*

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The Supreme Court of Illinois, in deciding the case of *Tilt* v. *The People*, has administered a telling blow to that class of State legislation which undertakes, in the guise of labor interests, to interfere with the right of private contract. The question involved was the constitutionality of the eight hour law of that State which provides, among other things, that no female should be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week. The court decided the statute to be unconstitutional, upon the ground, among others, that women as to contracts are on the same footing as men; that the section in question prohibits them from contracting as to their own labor and determining how many hours they may elect to work, and that such restrictions are an infringement on the rights of both employer and employee and are in conflict with the constitution. They hold that the right to labor or employ labor, and to make contracts in respect thereto upon such terms as may be agreed upon between the parties is included in the constitutional guaranty, citing *Frorer* v. *People*, *141 Ill. 171*; *State* v. *Loomis*, *115 Mo. 307*; *State* v. *Goodwillie*, *33 W. Va. 179*; *Godcharles* v. *Wigman*, *113 Pa. St. 431*; *Braceville Coal Co.* v. *People*, *147 Ill. 66*; *Com.* v. *Pearly*, *155 Mass. 117*; *Leep* v. *Ry. Co.*, *58 Ark. 407*. The court disapproves of and criticises the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Hamilton Manuf. Co.*, *120 Mass. 385*, claiming that its

reason in that case is "a begging of the question."—*Central Law Journal.*

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THE RIGHT OF ASYLUM.—Secretary Gresham has laid down some rules touching the rights of merchant steamers in foreign ports to afford asylum to refugees. This was in answer to a letter addressed to the state department in December, 1893, by C. P. Huntington, president of the Pacific Mail Steamship Company, asking for an exact definition of the powers of captains of merchant steamers in this respect. The secretary responded that the so-called doctrine of right of asylum has no application to merchant vessels in port, it follows that a shipmaster can exercise no discretion on the character of the offense charged against the refugee. While no general rule can be laid down as a comprehensive principle, a merchant vessel in a foreign port is within the local jurisdiction of the country with respect to the offenses or offenders against the laws thereof, and an orderly demand for the surrender of a person accused of crime by due process of law, with exhibition of a warrant of arrest in the hands of the regularly accredited officers of the law, may not be disregarded or resisted by the master of the ship. Arbitrary attempts to capture a passenger by force may call for a disavowal when the resort to violence endangers the lives of the innocent and the property of a friendly nation. Whether, if force be threatened, the master of a vessel is justified in putting in jeopardy, by his resistance, the interests conferred to his care, must be largely a question for his discretion. That the passengers may have come on board at the port where the demand is made or at another port of the same country is immaterial to the right of local jurisdiction.

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TORTS OF THE FIRE DEPARTMENT.—The City of New York is not responsible for the negligence of members of its Fire Department committed while attempting to extinguish a fire within the corporate limits.

This rule is not affected by the fact that the suit, based on that negligence, is brought in a Court of admiralty instead of a common law Court, and that the negligence complained of consisted in the improper navigation of a boat in the service of the Fire Department. Although in such a case the boat may have been the direct instrumentality in effecting a marine tort, neither the vessel nor the owners can be held responsible by reason of that circumstance alone.

Officers selected by municipal corporations to perform a public service for the general welfare of the inhabitants or of the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality and for their negligence or want of skill it cannot be held liable, even though their duties are defined and their offices created by the char-

ter or organic law of the municipality and such officers are selected, employed and paid by the corporation itself.

In selecting and employing such officers and agents, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents and servants of the public at large. (Reversing 63 Fed. Rep., 289.) *Robert W. Workman* v. *The Mayor et al. of New York, U. S. C. C. of App., 2 Cir.—New York Law Journal, Apr. 29.*

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COMPARATIVE CITATION OF REPORTS.—The editor of "Legal Bibliography" has compiled some interesting statistics of the frequency with which the judges of a State cite and rely upon foreign reports. His tables show the result of a count made of the citations in the judgments reported in the current volume of each set of State reports, and of the United States Reports, omitting, of course, the citations by each court of its own decisions. . .

To present an accurate result from one point of view, the tables should, of course, have taken into account the small number of citable cases in the reports of the smaller States. If, for instance, instead of sixteen volumes of Rhode Island, there were one hundred and fifty, as there are of Illinois, and the frequency of citation were maintained, Rhode Island would stand ninth, next but one after Illinois, instead of in her present position of thirty-sixth. From the point of view of a purchaser of law books, which is the purpose for which the statistics were compiled, that is just as much her misfortune, although not her fault.

The final result is so interesting that the Review copies it in full.

"Cases of other courts were cited in the decisions contained in the latest volumes of reports from forty-five States (including all the newer States, as well as the older,) as follows:—

| | | | |
|---|---|---|---|
| United States | 1669 | Georgia | 92 |
| English | 1594 | Tennessee | 89 |
| New York | 1424 | Kentucky | 87 |
| Massachusetts | 1268 | Nebraska | 78 |
| California | 806 | Mississippi | 70 |
| Pennsylvania | 532 | South Carolina | 66 |
| Illinois | 471 | Virginia | 66 |
| Michigan | 385 | Colorado | 62 |
| Iowa | 355 | Louisiana | 59 |
| Indiana | 317 | Nevada | 58 |
| Missouri | 306 | Arkansas | 53 |
| Wisconsin | 303 | Rhode Island | 39 |
| Maine | 230 | Oregon | 39 |
| Minnesota | 215 | West Virgina | 34 |
| Ohio | 207 | Arizona | 22 |
| Connecticutt | 206 | Montana | 21 |
| New Hampshire | 205 | Idaho | 15 |
| New Jersey | 205 | Florida | 14 |
| Alabama | 163 | South Dakota | 13 |
| Kansas | 158 | Washington | 12 |
| Vermont | 151 | North Dakota | 9 |
| Maryland | 131 | Delaware | 8 |
| Texas | 126 | Wyoming | 2" |
| North Carolina | 103 | | |

*Harvard Law Review.*

# RECENT MICHIGAN DECISIONS.

BAILMENT—HOTEL KEEPERS—THEFT OF MONEY DEPOSITED IN SAFE—An hotel keeper in whose safe a regular boarder deposited money for safe-keeping is, at most, a bailee for hire, and is not liable therefor where his night clerk steals the money from the safe, in the absence of any proof of want of ordinary care in employing him. *Campau* v. *City of Detroit.* (April 2).

CERTIORARI—CONTEMPT—REVIEW.—In contempt proceedings on the relation of a party to an action for inducing a witness to absent himself from the trial, a judgment refusing to compel the party in contempt to reimburse relator for loss incurred through his act of contempt, on the ground that relator incurred no loss, is not reviewable on certiorari by relator. *Montgomery et al.* v. *Muskegon Booming Co.* (March 19).

CHATTEL MORTGAGES—REPLEVIN—INSTRUCTIONS—BURDEN OF PROOF.—1. That a chattel mortgage, besides securing on actual indebtedness then due, embraces a sum as future advances, without that fact being disclosed on its face, does not alone render it fraudulent and void as to creditors. 2. It is error to refuse a charge to that effect, in replevin by the mortgagee against an attaching creditor of the mortgagor, where the court has charged that the mortgagee has no right to record an instrument bearing upon its face a false statement of the condition of his claim. 3. The burden of proof does not rest on the mortgagee in such a mortgage to show that it is not fraudulent. Grant, J., dissenting. *Brace et al.* v. *Berdan et al.* (March 19).

DETENTION OF WITNESS.—1. Although a person may, upon proper showing be held in custody as a witness, such detention will not be permitted merely upon ex parte affidavits. 2. Persons detained as witnesses are held "upon civil process," under How. Ann. St. § 8941, providing that persons held on civil process shall not be confined in a room with those arrested on a criminal charge. *In re Lewellyn.* (March 7).

ELECTION OF REMEDY—MISTAKE OF REMEDY—PROMISE TO PAY DEBT OF ANOTHER—A choice between two inconsistent remedies is binding. There is a distinction between an election and a mistake of remedies, and a just claim will not be lost because of an attempt to collect it by an action upon which there can be no recovery. A valid oral promise to pay another's debt may be made without releasing the original debtor, if the consideration does not pass to the original debtor alone. *McLaughlin* v. *Austin.* (April 21).

FORECLOSURE—FAILURE TO MAKE SECOND MORTGAGEE PARTY TO SUIT.—RIGHTS OF SUBSEQUENT MORTGAGEE—The failure of a first mortgagee to make a second mortgagee a party to the foreclosure suit, leaves the second mortgagee the right to redeem. Generally one paying a prior incumbrance and taking new security therefor, is not entitled to priority over an intervening incumbrance. *Draper* v. *Ashley.* (April 2).

HABEAS CORPUS—DETERMINATION OF CIRCUIT COURT CONCLUSIVE—REVIEW—The determination of a court on *habeas corpus* for the custody of children is conclusive in a subsequent application for the writ, unless some new fact has arisen. Such determination is reviewable on error or certiorari. *In re Mary B. Sneedon, a minor.* (April 16).

MUNICIPAL LAW—JURISDICTION OF COURT OF EQUITY—ACT 186, PUBLIC ACTS OF 1891, CONSTRUED. Money received under a void contract must be accounted for. Equity having once acquired jurisdiction of a cause will retain it to give such full relief as will finally dispose of a controversy. Taxpayers of a city are proper parties to enjoin the city from illegally disposing of corporate funds or illegally creat-

ing a corporate debt. Act 186, Public Acts of 1891, having empowered a majority of the electors of a city to determine the manner in which a city shall be lighted, and the electors having exercised their option under the Act, the council has no power to enter into a contract which would set aside such action. *George et al.* v. *Wyandotte Elect. L. Co. et al.*, and *Campbell* v. *City of Wyandotte.* (April 16).

PRACTICE—DISMISSAL OF PROCEEDINGS BY CIRCUIT COURT—A, agent of a second and third mortgagee seized property which had been taken upon a first mortgage, whereupon the first mortgagee brought replevin against A and the second mortgagee. *Held*, that it was error for the court to grant a motion discontinuing the action upon an agreement between the first and second mortgagees to which A had not been made a party. *Fowler* v. *Hosmer, Cir. Judge.* [April 16].

RAILROAD COMPANIES—KILLING LIVE STOCK—QUESTION FOR JURY.—The question whether an engineer negligently ran down horses which had escaped through a gate upon the track, or whether he did not, as testified to by him and the fireman, discover them until he was within 25 feet of them, and too late to avoid the accident, is for the jury, where sufficient to warrant an inference of knowledge of their presence on the part of the engineer and fireman. Grant and Hooker, J. J., dissenting *Granby* v. *Michigan Central Railroad Co.* (March 19).

SALE—RESCISSION FOR FRAUD—EVIDENCE.—1. Fraudulent representations in the statement required by 3 How. Ann. St. § 4161b1 to be filed by a corporation to prevent personal liability to its officers for its debts, and which is made the basis of a report by a commercial agency as to the corporation's financial standing, on the faith of which report goods are sold the corporation on credit, entitles the seller to rescind the sale for fraud. 2. A shrinkage in six months of 69 per cent, in the value placed by a corporation on its real and personal property in such statement and the value placed thereon by the receiver appointed on its insolvency, and the fact that the corporation within two weeks after purchasing goods, gave a chattel mortgage on all its property, are sufficient to warrant a finding that the corporation purchased the goods with a fraudulent intent, so as to entitle the seller to recover them from the receiver. *Silberman et al* v. *Munroe.* (March 19).

TAX TITLE—TOWNSHIP ASSESSMENTS—LABOR OR MONEY TAX—Where title to real estate is derived from various tax deeds it cannot be defeated by irregularities in all but one deed. The board of supervisors is only authorized to add to or deduct from the aggregate assessment of a township where the valuation is relatively unequal. When such is not the case the only statutory requirement is that the aggregate valuation of the taxable property of each township, as determined by the board, shall be entered upon the record. It is not necessary that the auditor general's certificate showing the amount of the authorized state tax be spread upon the record of the board, the presumption being that the board followed the certificate. When a statute for some purposes deems one dollar the equivalent of a day's work, a highway tax assessable in labor will not be considered a money tax because the board assessed a two dollar's highway tax against the land. *Hoffman* v. *Lynburn.* (April 2).

TESTIMONY—COMMUNICATIONS TO DENTIST NOT PRIVILEGED—When a witness produces a document to corroborate his testimony, it is competent in rebuttal to show that the document is false in one particular to discredit the entire testimony of such witness. How. Stats. §7516, prohibiting a physician or surgeon from disclosing information acquired in his profession, does not apply to a dentist. *People* v. *DeFrance.* (April 2).

WILLS—SPECIFIC LEGACY—CONSTRUCTION—EVIDENCE.—1. A gift in a will to a nephew, the owner of a tract of land, of $400, "the said $400 to be paid by my executor by assigning and transferring" to the legatee a certain mortgage on the land, is a specific legacy, and, in case the mortgage is discharged before testator's death, the legatee is not entitled to receive $400 in money. 2. In explanation of a will, testimony of the draftsman as to his understanding of testator's intention is inadmissible. *Wheeler* v. *Wood.* (March 19).

## BOOK REVIEWS.

ALDERSON ON JUDICIAL WRITS AND PROCESS—A Practical Treatise upon Law of Judicial Writs and Process in Civil and Criminal Cases, the Sufficiency, Validity, Amendment and Alteration of Process; its Execution and Return, and the Powers and Liabilities of Officers thereunder. By WILLIAM A. ALDERSON of the New York Bar. New York: Baker, Voorhis and Company. One vol., 8 vo., pp. 667. $6.00 net.

There is nothing apparent that makes it necessary for this book to offer an apology for its existance. This cannot be said of all law books now upon the market. It is not a rehash of a well worn subject, nor a work of mere local importance. It is not a work of an impractical kind, nor the unskilled effort of an inexperienced author. It bears the imprint of original research into subjects before slightly treated, and by a practitioner of experience. It is practical in every sense of the word. It is as useful to the bench and bar of one state as to that of any other. In short, it is the kind of a new book that a reviewer likes to have fall into his hands. It is conveniently divided into five parts, and contains thirty-two chapters. Part I. treats of the history, definition and kinds of process. Part II. considers the issuing of process, its sufficiency, validity, alteration and amendment. The chapter distinguishing between void, voidable, irregular and erroneous process, and those upon the style or title, direction or address, teste, sealing and signing of process being of special interest and value. In this part is also considered in detail the writs of summons, subpoena, subpoena duces tecum, execution, replevin, attachment, scire facias, injunction and of error; also alias and pluries writs. Part III. follows with a careful consideration of the service and execution of process. "A thousand and one" interesting questions, which arise in every day practice concerning the manner and suffiiciency of service, and the duties, powers and liabilities of officers in the execution of process, are here carefully treated. Part IV. treats of the return of process in the same careful manner. Part V. is devoted to criminal process. There are 620 pages of text. The table of contents and of the cases cited is complete. If anything can be criticised it is the index which seems to be deficient in some instances.

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AMERICAN ELECTRICAL CASES. Vol. II.—A Collection of All the Important Cases (excepting Patent Cases) Decided in the State and Federal Courts of the United States from 1878 on subjects relating to the Telegraph, the Telephone, Electric Light and Power, and other Practical Uses of Electricity, with Annotations. Edited by WILLIAM W. MORRILL; Author of "Competency and Privilege of Witnesses," etc. Vol. II. 1886-1889. Albany: Matthew Bender. 915 pp. $6.00.

In this volume, which is volume two of the series, are collected the leading cases on this subject of ever increasing magnitude, from

January 1st. 1886, the period covered by Volume 1, to July 1st. 1889.

This volume is like its predecessor, which is already so favorably known to the profession, except in a few particulars which have been changed upon the suggestions of members of the bar and editors of law journals. As it now is it is hard to see where there is room for any further improvement. It is idle to comment upon the immense and ever increasing legal importance of electricity. The great and as yet exclusive field which this series is covering can in some measure be realized when it is considered that it was only in 1886, the period at which this volume commences, that the first electric street railway was operated. The cases have been well selected and may be read with profit by every lawyer who wishes to keep pace with the development and progress of the law. The first case which construes and upholds the constitutionality of the act of the Indiana legislature (April 13, 1885) regulating the rental allowed for the use of telephones suggests a good way to deal with those monopolies. At the end of each case there is an annotation with references to the cases cited in the opinion and to the other cases in the series on the same subject. In this way every case reported in the entire series will be found in every case involving the same questions. The index is arranged in the form of a digest which shows the exact point decided in each case. In point of arrangement, and convenience for ready reference this volume leaves nothing to be desired. We especially commend the index, notes, and the selection of cases.

## CURRENT LITERATURE.

Conspicuous among the contents of the May *Atlantic* is Percival Lowell's first paper on Mars. The subject is the Atmosphere of Mars, and it is treated with such skill that the reader finds new interest in the scientific information given. Two papers of unusual historical interest are The Political Depravity of our Fathers, by John B. McMaster, and Dr. Rush and General Washington, by Paul Leicester Ford.

The *Review of Reviews* for May contains three leading articles: "The Art of John La Farge," with portraits of Mr. La Farge and reproductions of paintings and stained glass windows; a character sketch of "Sir John Everett Millais, Bart.;" and a sketch of "England's Home Secretary, the Rt. Hon. Herbert Henry Asquith."

The May number of the *American Magazine of Civics* opens with an article on "The Social Pressure of Politics," by William B. Chisholm, which is followed by "Civilization and the State," by A. A. Johnson. "Bimetallism vs. the Single Standard" is discussed by L. Bradford Prince, and "Distinctive American Citizenship," by Adolph Roeder.

In the current number of *The Illustrated American* we find an excellent likeness of that remarkable woman, Mrs. Paran Stevens, who for many years occupied so prominent a position in American society. The article upon the deceased lady is entitled, "Madame Sans-Gene of New York," and points out that "much nonsense has appeared in the public prints regarding the alleged poverty of her surroundings and the social obscurity of her family."

The leading article in the *Forum* for May is a noteworthy study of the career and character of Prince Bismarck, entitled "Bismarck; the Strongest Personality Since Napoleon," by Col. Theodore A. Dodge, the well-known military writer. Mr. Frederic Harrison contributes his eighth study of the great Victorian writers with "Anthony Trollope's Place in Literature."

The April numbers of *Littell's Living Age* are especially rich in descriptions of travel. Through them we get views of the Nile, the Yangtsye, the Tatra Mountains and the "Black Country of Staffordshire." William Griswell, in "The Crisis in New Foundland," discusses the probability of the request of that colony to be taken back under the conditions of crown rule.

Readers of *Public Opinion* must appreciate it more and more just at present. So many questions of public interest, political, financial, religious, educational, etc., occupy the attention of the reading public that, to be abreast with the times, one must be an incessant reader. *Public Opinion* solves the problem. It condenses and summarizes the views of all the papers in such a satisfactory manner that the labors of the reader are lessened many fold.

The May *Popular Science Monthly* has several articles of especial interest to professional men. The chief feature, perhaps, is the article by Herbert Spencer, which is announced as the first of a series upon "Professional Institutions." In this issue he discusses "Professions in General." Prof. Sully contributes the eighth of his series of "Studies of Childhood."

The leading articles in the *North American Review* are, "The Preacher and his Province," by Cardinal Gibbons, and "The Future of Japan," by the Japanese Minister. The Hon. Wm. T. Harris, U. S. Commissioner of Education contributes a very readable article upon "Elementary Education." Of special timely interest are the discussions upon the Income Tax. "The Spirit of the Tax" is discussed by a writer who conceals his identity under the name "Plain Speaker."

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## *A FEW WORDS ABOUT FENCES.*

FRANK E. ROBSON.

Wherever the people, in a manner more or less direct, constitute the lawmaking power, it follows as a natural consequence, that every great movement of that people finds expression in the laws by which it is governed. The character of this expression may be ephemeral or permanent, depending upon many events, and circumstances, some of which are easy to discover, others becoming more obscured as the years pass by. The reason that brought the statute into existence may often be far from that which keeps it from being repealed.

The pursuits of a people find expression in the laws governing that community. If they be fishermen, we find the statutes full of provisions regulating the rights of fishing, and for the protection of those rights, etc. If they be engaged in agriculture, the law will remind us of land, sheep, cattle, horses, and pasturage, and will contain provisions for the protection of the citizens from the ravages of cattle thieves, of estrays.

The early New England settlements were practically agricultural communities for many years following their formation. And the records of the several colonies are full of laws, ordinances and regulations of the character just mentioned. Many of these were similar to and probably adopted from the laws of the parts of England from which the colonists came, and patient investigators think they have found an origin for others among teutonic peoples, and settlements earlier than the Saxon conquest of England—regulations claimed to have long since become obsolete in England—if they ever were in use there.

As these settlements of hardy pioneers gradually expanded and overflowed into the great west, the descendants of the Puritans and

Pilgrims took with them the laws and traditions of their forefathers, and adopted them to new conditions and new surroundings. With all the changes necessary to meet the wants of the marvelous growth of the west, many of these laws and regulations brought in by the pioneers from the earlier settlements of the east still survive, practically unchanged. It is an interesting study to trace this growth and development, or the survival of old forms as the case may be.

Among the present statutes of Michigan may be found some of these. I refer to the provisions establishing what shall be a legal fence and the office and duties of fence viewers. Closely connected with these are the statutes regulating the impounding of cattle to which an occasional reference will be made.

The present law provides that "All fences four and a half feet high, and in good repair, consisting of rails, timber, boards, or stone walls, or any combination thereof, and all brooks, rivers, ponds, creeks, ditches, and hedges, or other things which shall be considered equivalent thereto, in the judgment of the fence viewers within whose jurisdiction the same may be, shall be deemed legal and sufficient fences," and the statute further provides that the overseers of the highway shall be fence viewers. In general the duties of fence viewers are to settle difficulties growing out of boundary and line fences, the assigning of portions to be erected by adjoining proprietors, and determining whether or not certain fences are legal and sufficient.

This statute was in substance taken from the provisions of the Massachussetts statutes, and adapted to the territory of Michigan by the governor and judges, principally in 1821, but some portions were adopted as early as 1809. The first section of the act of 1821 provides "That a fence of strong and sound materials four feet and a half high, so close that hogs and sheep cannot creep through, or a hedge two feet high upon a ditch three feet deep and three feet broad, or instead of such hedge a fence two and a half feet high, the hedge or fence being so close that the animals aforesaid cannot creep through, shall be accounted a lawful fence." The fence viewers were to be three in number and appointed by any Justice of the Peace in the county on application of parties desiring their appointment.

The statutes of Massachussetts were made up from those of the several colonies which eventually composed the state. The enactments in each colony or plantation regulating fences contained in the main the same provisions. In 1693 that of Massachussetts Bay

provided that "All fences of four feet high, being of five rails, or four equivalent boards, stone walls, brooks, rivers, ponds, or creeks equivalent thereto in the judgment of the fence viewers, shall be accounted sufficient fences." Plymouth colony in 1675 provided that "All fences for securing of corne shall be full four foot high or otherwise sufficient by the judgment of Indifferent men." And in 1652, "that such ffences as are judged sufficient against oxen and Cowes shall be allowed sufficient against horses and mares." The fence viewers generally seem to have been elected as other town officers at the annual town meeting in the spring, though they were often "Indifferent Men" appointed by the Justice of the Peace or by the selectmen.

In close connection with these regulations relating to fence and fence viewers, we find regulations relating to the "Village Pound," sometimes the two mentioned in the same section of the same act. In our Michigan laws it is a part of the same chapter.

Added to the regulations of 1652 already cited from the Plymouth colony records is, "and if any horse beast breake into any corne or grasse over such sufficient ffence, the owners of such horse shall pay damage proved as if they were impounded" A still earlier enactment reads, "That every Constablerick have a sufficient pound to impound cattle that shall transgresse any such orders as are or shall be made."

If there is one desire peculiar to germanic peoples over all others, it is the possession of a home lot; and when it is obtained notice of the fact is given to the world by building a fence around it. The marking off of property rights by a fence was a custom well understood by our germanic ancestors, and the worthy Pilgrim fathers had no sooner set foot on this Continent than they at once gave expression to their claims to dominion in the ancient manner.

An early chronicler has preserved to us the manner of the first settlement of Plymouth, in words now quaint as well as interesting. He says, "After our landing and viewing of the places as well as we could, we came to a conclusion by most voyces, to set on the maine land, in the first place on a high ground where there is a great deal of Land clearde and hath been planted with Corne three or four years agoe, and there is a very sweet brooke runnes under the hill-side and many delicate springs of as good water as can be drunke, . . . Thursday the 28th of December, (January 7, N. S.) so many as could went to work on the hill where we proposed to build our platforme for our Ordinance, and which doth command all the plaine

and the Bay, and from whence we may see farre into the sea, and might be easier impayled having two rowes of houses and a faire street. So in the afternoon we went to measure out the grounds, and first, we tooke notice how many Families there were, willing all single men that had no wives to joyne with some Famlie, as they thought fit, that so we might build fewer houses, which was done, and we reduced them to 19 Families; to greater Families we allotted larger plots, to every person half a pole in breadth, and three in length, and so lots were cast where every man should lie, which was done and staked out."

Speaking of the size of the allottments he says, "we thought this proportion was large enough at the first, for houses and gardens to impale them around, considering the weakness of our people . . ."

The custom of impaling the house lot and attached garden is one very closely connected with the ancient town and modern township.

The word town is in fact but the modified Saxon "tun", meaning originally the hedge or ditch surrounding the home farm or house lot, and from this the word has been extended to mean the place hedged in, whether it be the farm of the individual, the house lot, the town lands or the town itself. Prof. Nasse, in his "Agricultural Communities in the Middle Ages," sets forth the nature of the "tun" and its relation to the modern town in a manner cited with approval by later investigators. He says, "The names of places show that, among the Saxons, only the dwelling place—that is, house and homestead—was inclosed; the arable land and the pastures being open and unfenced. . . . This word, it is well known, is identical with the modern "town" . . . and was less used by the Anglo-Saxons to signify 'that wherewith a space is inclosed, than the inclosed space itself.' . . Apparently, as was also the case in Germany, not only the individual homesteads, but also several situated near each other, were surrounded by an inclosure, which explains the reason why not only the homestead, but also the whole village was called 'tun.'" Prof. Nasse also cites an old Jute law which prescribes "that every village shall be inclosed by a hedge" and gives detailed rules for the duty of every villager to put up his part of the common fence which inclosed the whole village as well as single farmsteads.

In most of the early Massachussetts settlements the lands were held in common by the inhabitants of the town, and in the early records are found many entries relating to regulation of these hold-

ings.

The following from the records of Massachussets Bay colony throws some light on the system. In the spring of 1643 it was ordered that "For preventing disorder in corn fields which are inclosed in common . . . that those who have the greater quantity in such fields shall have power to order the whole, notwithstanding any former order to the contrary, and that every one who hath any part in such common field shall make and maintaine the fences according to their several quantities."

The following is from an early English statute: "If ceorls have a common meadow, or other partible land to fence, and some have fenced their part, and some have not, and strange cattle come in and eat up the common corn and grass, let those go who own the gap and compensate." And this rule of compensation for damages done appears in a regulation of Plymouth Colony enacted in 1638: "That whatsoever damage comes to any by cows, goats, mares, sheepe or any of those kinds by coming into their corne or gardens be made good by the owners of the said cattle as it shall be valued by two of the neighbors. And that it shall be lawful upon each such trespasse to impound the cattle trespassing till due satisfaction be made."

That this communal use of lands was not without its difficulties is evidenced by the following from an early enactment of Massachusetts Bay Colony: "Whereas it is found by experience that there hath beene much trouble and difference in severall townes about the manner of planting, sowing, & Feeding of common corne feilds, & that upon serious consideration wee find no general order can provide for the best improvement of every such common ffeild, by reason that some consist onely of plowing ground, some having a great part fit onely for planting, some of meadowe and feeding grounds, also, so that such an order as may be very wholesome & good for one feild may bee exceedingly prejudiciall and inconvenient for another—it is therefore ordered, that where the commoners cannot agree about the manner of the improvement of their feild, either concerning the kind of graine that shall bee sowen or set therein, or concerning the time or manner of feeding the herbage thereof, that then such persons in the severall townes that are deputed to order the prudenciall affairs thereof, shall order the same, or in case where no such are, then the major part of the freemen, who are hereby enjoined with what convenient speed they may determine any such difference as may arise upon any information given them by the said commoners; & so much of any former order as concerns

the improvement of common feilds, and that is hereon provided for, is hereon repealed."

And in 1638 it was ordered that "fforasmuch as divers of our towne are resolved to sowe English graine this spring . . . that all common & particular home ffences about the towne shall be sufficiently made up before the twentieth of the ffirst moneth next (April) uppon the payne or penaltie of 5s. every day after, that any one is defective therein."

Hatfield Side voted May 7, 1662, "that the south Meadow should be cleared of cattle and Horses by Friday next, any cattle without Keeper, or with keeper on mowing ground shall pay 1 shilling each to him that brings them to the pound and 4 pence to the Pound Keepers.

The office of Hayward is often mentioned in the old records as "the watchman upon the walls of the pasture." The office had nothing to do with haying or grass lots, but means the warden of the hedges or fences. The following extracts from the town records of Salem will perhaps serve to illustrate the duties of the office of Hayward. "Voted that the Gates att both Ends of the field be made good & well repaired. And that the Little Gates especially be Made and Hung so as to be easy for Travellers to pass at the charge of the proprietary, and that the Haywards accordingly are desired & Impowered to do it & to Render an Account of the Charge at the next proprietors meeting" . . . "Voated that the Haywards. . . or any of the proprietors of the Southfield shall have power to take up and Impound any horse kind or any other cattle which shall be found loose upon his own ground or the grounds of any other proprietor of the Southfield feedings unless they be tyed & that none shall tether in the nighttime upon the penalty of what the law doth determine in case of Damage fleazant. And this is to be from the tenth of April to the 14th of October . . . & that the ffield be drove by the Hayward the 10th of April & not to be broken open till 14th October next."

It would be easy to fill many more pages with references of a like character, but enough has possibly been presented to give an idea of the ancient character of two of our simple statutes. These are but examples of what might be done with many others, with a little study and patient investigation. And in these statutes we are paying silent homage to those sturdy ancestors who, to use the words of Dr. Adams, "tossing upon the waves of the

North Sea and preparing to descend upon the coasts of Britain . . . bore with them a knowledge of self-government, which, when rooted in the soil of Great Britain, grew into Saxon England and the law of the land."

# LIQUOR LICENSE LAWS.

HAMILTON G. HOWARD.

Every mature, intelligent and thoughtful individual of either sex recognizes the dangers threatened and the evils done the social fabric of the state by means of the unrestricted manufacture and sale of intoxicating alcoholic liquors. The subject is scarcely open at this day to discussion. Criminal court and prison statistics furnish overwhelming and irrefutable evidence in corroboration of the truth of this fact. How then shall the sale of liquors be regulated is the question before us. What is the best course at this day known to the law? By the curtesy of a member of the Pennsylvania legislature, the Hon. J. S. Fruit, I am enabled to present through the pages of the MICHIGAN LAW JOURNAL, to the members of the bar of Michigan and to the public at large a few of the material portions of the Pennsylvania Retail Liquor Law which I regard as by far the most intelligent and comprehensive enactment on the subject. That law places the entire control of the traffic in the hands of the judges of the courts of record, and if adopted by way of amendment to the liquor license bill recently passed by our state legislature would go far towards benefiting the weak willed portion of our two million citizens.

The following are excerpts from the law:

SEC. 2. Licenses for the sale of vinous, spirituous, malt or brewed liquors at retail, in quantities not exceeding one quart, shall only be granted to citizens of the United States of temperate habits and good moral character.

SEC. 3. Such licenses may be granted only by the court of quarter sessions of the proper county, and shall be for one year from a date fixed by rule or standing order of said court. The said court shall fix, by rule or standing order, a time at which application for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel.

SEC. 4. Every person intending to apply for a license as aforesaid shall file with the clerk of the court of quarter sessions of the proper county his, her or their petition, at least three weeks before the first day of the sessions of the court at which the same is to be

heard, and shall at the same time pay said clerk five dollars for expenses connected therewith; and said clerk shall cause to be published three times in two newspapers, designated by the said court, a list containing the names of all such applicants, their respective residences and the place for which application is made; the first publication shall be not less than fifteen nor more than twenty-five days before the time fixed by the court; *Provided*, That no license shall be granted, under the provisions of this act, to any person to sell in any room where groceries are sold at wholesale or retail.

SEC. 5. Said petition shall contain,

*First*. The name and present residence of applicant, and how long he has there resided;

*Second*. The particular place for which a license is desired;

*Third*. The place of birth of said applicant, and if a naturalized citizen where and when naturalized;

*Fourth*. The name of owner of premises;

*Fifth*. That the place to be licensed is necessary for the accommodation of the public;

*Sixth*. That none of the applicants are in any manner pecuniarily interested in the profits of the business conducted at any other place in said county, where any of said liquors are sold or kept for sale;

*Seventh*. That the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein, during the continuance of the license;

*Eighth*. Whether applicant, or any of them, has had a license for the sale of liquors in this Commonwealth, during any portion of the year preceding this application, revoked.

*Ninth*. The names of no less than two reputable freeholders of the ward or township where the liquor is to be sold, who will be his, her or their sureties on the bond, which is required, and a statement that each of said sureties is a *bona fide* owner of real estate in the said county worth over and above all incumbrances the sum of two thousand dollars, and that it would sell for that much at public sale, and that he is not engaged in the manufacture of spirituous, vinous, malt or brewed liquors;

*Tenth*. This petition must be verified by affidavit of applicant, made before the clerk of the court, a magistrate, notary public or justice of the peace, and if any false statement is made in any part

of said petition, the applicant or applicants shall be deemed guilty of the crime of perjury, and upon indictment and conviction shall be subject to its penalties.

SEC. 7. The said court of quarter sessions shall hear petitions from residents of the ward, borough or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted; and, upon sufficient cause being shown, or proof being made to the said court, that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the court of quarter sessions shall, upon notice being given to the person so licensed, revoke the said license.

SEC. 10. That the license shall not be issued to any person or persons until he, she or they shall have executed a bond to the Commonwealth and a warrant of attorney to confess judgment in the penal sum of two thousand dollars, with two sufficient sureties, to be approved by the court granting such license.

SEC 14. No licensee, who shall sell liquors by less measure than one quart, shall trust or give credit therefor under penalty of losing and forfeiting such debt, and no action shall be maintained or recovery had in any case for the value of liquors sold in violation of the provisions of this section, and defense may be taken in said cases against such recovery without special plea of notice.

These extracts show the general outlines of the Pennsylvania law which if adopted in Michigan would undoubtedly prove of great and permanent benefit. Such legislation as this is the best that can be devised, as experience has shown that prohibitory laws are dismal failures. Mere punitive or prohibitory laws can never effect any great or lasting good as they do not go far enough; they do not reach the cause of the evil. Especially is this true in the case of intemperance, for the appetite for strong liquor is an inborn craving which all races have developed to a greater or less extent, and as such it is beyond all legislation. The most that the state can do is to regulate the manufacture and sale of intoxicating liquors by wise laws in such a way as to lessen the evil as much as possible.

# THE INCOME TAX.

CHARLES POLLOCK, Appellant, *v.* THE FARMERS' LOAN & TRUST CO. ET AL.

*Supreme Court of the United States, May 20, 1895. Appeal from the Circuit Court of the United States for the Southern District of New York.*

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1. The court adheres to the opinion already announced that taxes on real estate being indisputably direct taxes—taxes on the rents of income of real estate are equally direct taxes.

2. The court is of opinion that taxes on personal property or on the income of personal property are likewise direct taxes.

3. The tax imposed by sections 27 to 37, inclusive of the act of 1894, so far as it falls on the income of real estate and on personal property, being a direct tax within the meaning of the constitution, and, therefore, unconstitutional and void because not apportioned according to representation of those sections constituting one entire scheme of taxation, are necessarily invalid.

Opinion of the court by Mr. Chief Justice MELVILLE W. FULLER.

Whenever the court is required to pass upon the validity of an act of Congress, as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care, and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power and brings into consideration, as vitally affected by the decision, that complex system of government so sagaciously framed to secure and perpetuate "an indestructible Union composed of indestructible States."

We have, therefore, an anxious desire to omit nothing which might in any degree tend to elucidate the question submitted, and, aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that while our former conclusions remain unchanged their scope must be enlarged by the acceptance of their logical consequences.

The very nature of the constitution, as observed by Chief Justice Marshall in one of his greatest judgments, "required that only its great outlines should be marked, its important objects designated and the minor ingredients which compose those objects be deducted from the nature of the objects themselves." In considering this question, then, we must never forget that it is a constitution that

we are expounding.

As heretofore stated, the constitution divided Federal taxation into two great classes—the class of direct taxes and the class of duties, imposts, and excises—and prescribed two rules which qualified the grant of power as to each class. The power to lay direct taxes, apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not in the meaning of the constitution, and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived—that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source; and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owners of real or personal property in the manner prescribed is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the constitution.

The words of the constitution are to be taken in their obvious sense and to have a reasonable construction. In *Gibbons* v. *Ogden*, Mr. Chief Justice Marshall with his usual felicity said:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said."

We know of no reason for holding otherwise than that the words "direct taxes" on the one hand and "duties, imposts and excises" on the other, were used in the constitution in their natural and obvious senses, nor in arriving at what those terms embrace do we perceive any ground for enlarging them beyond or narrowing them within their natural and obvious import at the time the constitution was framed and ratified.

And passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the constitution are considered.

We do not care to retravel ground already traversed, but some observations may be added.

In the light of the struggle of the convention as to whether the nation should be empowered to levy taxes directly on the individual until after the States had failed to respond to requisitions, a struggle which did not terminate until the amendment to that effect proposed by Massachussetts and concurred in by South Carolina, New Hampshire, New York and Rhode Island had been rejected, it would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed.

This is forcibly illustrated by a letter of Mr. Madison of January 29, 1789, recently published, written after the ratification of the constitution, but before the organization of the government; but the submission of the proposed amendment to Congress, which, while opposing the amendment as calculated to impair the power, only to be exercised in "extraordinary emergencies," assigns adequate ground for its rejection as substantially unnecessary, since he says: "Every State which chooses to collect its own quota may always prevent a Federal collection by keeping a little beforehand in its finances and making its payment at once into the Federal treasury."

The reasons for the clauses of the constitution in respect of direct taxation are not far to seek. The States respectively possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from

commerce; they retained the concurrent power of levying excises and duties if covering anything other than excises, but in respect of them the range of taxation was narrowed by the power granted over interstate commerce and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation and to that they looked as their chief resource, but even in respect of that they granted the concurrent power; and if the tax were placed by both governments on the same subject the claim of the United States had preference.

Therefore they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned and to recoup from their own citizens in the most feasible way and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was adequately stipulated for, just as the equal representation of the States, however small, in the Senate was stipulated for.

The constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall, by amendment, be deprived of its equal suffrage in the Senate without its consent. The constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected those of the Federal Government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminatingly as to particular States or otherwise by a mere majority vote, possibly of those whose constituents were intentionally not subject to any part of the burden, the qualified grant was made.

Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Mar-

shall, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation;" and they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty; and as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breadth and the restriction blown to the winds in another.

Cooley (on taxation) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than custom, which is a duty imposed on imports or exports." That the term impost also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost levied upon articles of manufacture or sale and also upon licenses to pursue certain trades or to deal in certain commodities.

In the constitution the words "duties, imposts and excises," are put in antithesis to direct taxes.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison as thrown into relief in the pages of the *Federalist* and in respect of the enactment of the carriage tax act, and again to briefly consider the Hylton case so much dwelt on in argument. The act of June 4, 1794, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. It was, therefore as much a part of a system of taxation in war times as was the income tax of the war of the rebellion. The bill passed the House May 29th, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers that day reported in the annals.

"Mr. Madison objected to this tax on carriages as unconstitutional, and as an unconstitutional measure he would vote against it." Mr. Ames said: "It was not to be wondered at that he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachussetts

its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affimative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty for the purpose of income or ordinarily yielding income and to the income therefrom. All the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an apportionment be made according to the constitution. The constitution does not say that no direct tax shall be laid by apportionment on any property than land; on the contrary, it forbids all unapportioned direct taxes and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax can not be laid and assessed, as Mr. Gallatin said in his report when secretary of the treasury in 1812: "Upon the same objects of taxation on which the direct tax levied under the authority of the State are laid and assessed."

Nor are we impressed with the argument that because in the four instances in which the power of direct taxation has been exercised Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, that this amounts to such a practical construction of the constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted and certainly can not accede to the idea that the constitution has become weakened by a particular course of inaction under it.

The stress of the argument is known, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected have lost all connection with their origin, and although once not taxable, have become transmuted in their near form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt as expressed in his celebrated speech introducing his income tax law of 1799 and he did not hesitate to carry it to its logical conclusion. The English

loan acts provided that the public dividends should be paid "free of all taxes" and charges whatsoever, but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income and that the holder had no reason to complain. "And this," said Mr. Gladstone fifty-five years after, "was the national construction of the pledge."

The dissenting Justices proceeded in effect upon this ground in *Weston* v. *Charleston*, but the court rejected it. That was a State tax, it is true, but the States have power to lay income taxes, and if the source is not open to inquiry constitutional safeguards might be easily eluded.

We have unanimously held in this case that so far as this law operates on the receipts from municipal bonds it can not be sustained because it is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the attorney-general with characteristic candor; and it inevitably follows that if the revenue derived from municipal bonds can not be taxed because the source can not be, the same rule applies to revenue from any other source not subject to a tax, and the lack of power to levy any but an apportioned tax on real and personal property usually exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its sources, still we can not doubt that such a tax is necessarily a direct tax in the meaning of the constitution. In England we do not understand that an income tax has ever been regarded as other than a direct tax.

In Dowell's history of taxation and taxes in England, admitted to be the leading authority, the evolution of taxation in that country is given and an income tax is invariably classified as a direct tax. That view is concurred in by cyclopedists and lexicographers and political economists and generally by the classification of European governments wherever an income tax obtains.

In *Attorney General* v. *The Queen Insurance Company*, which arose under the British North American act of 1867, which provided that the provincial legislatures could only raise revenue for provin-

cial purposes within each province (in addition to licenses) by direct taxation, an act of the Quebec legislature laying a stamp duty came under consideration, and the judicial committee of the privy council, speaking by Jessel, M. R., held that the word "direct taxation" had either a technical meaning or a general meaning, or, as it is sometimes called, a popular meaning. One or the other meaning the words must have, and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language, and considering "their meaning either as words used in the sense of political economy or as words used in jurisprudence in the courts of law," it was concluded that stamps were not included in the category of direct taxation, and that the imposition was not warranted.

In *Bank of Toronto* v. *Lamb*, the privy council, discussing the same subject in dealing with the argument much pressed at the bar that a tax to be strictly direct must be general, said that they had no hesitation in rejecting it for legal purposes.

It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such and is generally looked on as a direct tax of the most obvious kind, and it would run counter to the common understanding of men on this subject, which is one main clew to the meaning of the legislature.

If it were the fact that there had been no income tax law, such as this, at the time the constitution was framed and adopted, it would not be of controlling importance. A direct tax can not be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. As Chief Justice Marshall said in the Dartmouth College case: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed nor of the American people when it was adopted. It is necessary to go further and to say that had this particular case been suggested the language would have been so varied as to exclude it or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception."

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Can not Congress if the necessity exist of raising thirty, forty, or any other number of millions

of dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property, or the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and its own way? Inconveniences might possibly attend the levy of an income tax, but that it is apportionable is hardly denied although it is asserted that it would operate so unequally as to be undesirable.

In the disposition of the inquiry whether a general unapportioned tax on the income of real and personal property can be sustained under the constitution, it is apparent that the suggestion that the result of compliance with the fundamental law would lead to the abandonment of that method of taxation altogether, because of inequalities alleged to necessarily accompany its pursuit could not be allowed to influence the conclusion, but the suggestion not unnaturally invites attention to the contention of appellant's counsel, that the want of uniformity and equality in this act is such as to invalidate it. And figures drawn from the census are given, showing that enormous assets of mutual insurance companies, of building associations, of mutual savings banks, large productive property of ecclesiastical organizations are exempted, and that the exemptions reach so many hundred millions that the rate of taxation would perhaps have been reduced one-half if they had not been made.

We are not dealing with the act from that point of view, but assuming the data to be substantially reliable, if the sum desired to be raised had been apportioned, it may be doubted whether any State which paid its quota and collected the amount by its own methods would or could under its constitution have allowed a large part of the property alluded to to escape the taxation.

If so, a better measure of equality would have been attained than would be otherwise possible, since according to the argument for the government, the rule of equality is not prescribed by the constitution as to federal taxation and the observance of such a rule as inherent in all just taxation is purely matter of legislative discretion.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand equal and just, and on the other elastic and certain; not that it is not open to abuse by such

deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion and inquisitorial in its methods, but because it is pre-eminently a tax upon the rich and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States as a representative of an indivisible nationality, as a political sovereign, equal in authority to any other on the face of the globe, equal to all emergencies, foreign or domestic, and having at its command for offense and defense and for all governmental purposes all the resources of the nation "would be but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property throughout the United States without apportionment.

The power to tax real and personal property and the income from both through apportionment is conceded; that such a tax is a direct tax in the meaning of the constitution has not been denied and in our judgment can not be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the constitution which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to State lines and in such a manner that the States can not intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be not less powerful but less absolute than the imagination of advocates had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties and can not be settled by judicial decision. In such cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is being unapportioned in violation of the constitution, and we must so declare.

Differences have often occurred in this court, differences exist now, but there has never been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand.

If it be true that the constitution should have been so framed

that a tax of this kind could be laid the instrument defines a way for its amendment. In no part of it was greater sagacity displayed except that no State, without its consent, can be deprived of its equal suffrage in the senate. The constitution may be amended upon the concurrence of two-thirds of both houses and the ratification of the legislatures or conventions of the several States or through a Federal convention when applied for by the legislatures of two-thirds of the States and upon like ratification.

The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis to exhaust itself and the sober, second thought of every part of the country to be asserted.

We have considered the act only in respect of the tax on incomes derived from real estate, and invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of the opinion that so much of the sections of the law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of the conclusion upon these sections as a whole. It is elementary that the same statute may be in part constitutional, and in part unconstitutional, and if the parts are wholly independent of each other that which is constitutional may stand while that which is unconstitutional will be rejected.

And in the case before us there is no question as to the validity of the act, except sections 27 to 37, inclusive, which relates to the subject which has been under discussion, and as to them we think the rule laid down by Chief Justice Shaw, in *Warren* v. *Charleston* is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.

Or, as the point is put by Mr. Justice Matthews, in *Poindexter* v. *Greenhow*: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another may be declared inoperative and void because unconstitutional, but these are cases where the parts are so distinctly separable

that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

And again, as stated by the same eminent Judge, in *Sprague* v. *Thompson*, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the State is made to enact what, confessedly, the legislature never meant. It confers upon the statute a positive operation beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census the true valuation of real and personal property in the United States in 1890, was $65,037,091,191, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted in applying these sections all unproductive property, and all property whose net yield does not exceed $4,000, but even with such deduction, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations, and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We can not believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property or the income thereof might not also lay excise taxes on business, previleges, employments and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part of it were held valid in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that Secs. 27 to 37, inclusive, of the act which became a law without the signature of the President on Aug. 28, 1894, are wholly inoperative and void.

The conclusions of the court are as follows:

First—We adhere to the opinion already announced that taxes on real estate, being indisputably direct taxes, taxes on the rents on income of real estate are equally direct taxes.

Second—We are of opinion that taxes on personal property or on the income of personal property are likewise direct taxes.

Third—The tax imposed by Secs. 27 to 37 inclusive, of the act of 1894, so far as it falls on the income of real estate and on personal property, being a direct tax within the meaning of the constitution, and therefore unconstitutional and void because not apportioned according to representation, all those sections constituting one entire scheme of taxation are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated. The decrees below will be reversed and the cases remanded with instructions to grant the relief prayed.

Secs. 27 to 37, of the tariff act of 1894, referred to in the conclusions of the court in the opinions, are all in the sections of the act relating to the income tax, so that the entire income tax law is declared void specifically.

From the opinion of the court, Justices Harlan, White, Brown and Jackson, dissented. The majority of the court joining in the opinion were Chief Justice Fuller, Justices Field, Shiras, Gray and Brewer.

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## *NOTES.*

PUBLIC OPINION AS A FACTOR IN THE INCOME TAX DECISION.—No case within the last quarter of a century has attracted such intense public interest, as the Income Tax cases, recently decided by the Supreme Court of the United States. The pressure of popular sentiment is apparent in every phase. That the influence of public opinion is potent enough to induce our highest tribunal to depart from principles of constitutional construction heretofore positively sanctioned by it, is thoroughly demonstrated. The action of the court in admitting argument on motion for rehearing, is without precedent in its history, and doubtless the august tribunal bent under the popular will in ordering such re-argument of its own motion. It seems that prior to 1863 the Supreme Court possessed no official cognizance of petitions for re-hearing. But in that year counsel made argument on a motion which was substantially a petition for re-hearing. Subsequently petitions for re-hearing were occasionally entered, although invariably discouraged and disallowed by the Court, until in 1869 in the case of *Walker* v. *Public Schools of St. Louis*, an apparently rigid rule relative to the subject was established. The Court held that "where the Court of its own motion did not direct a re-hearing of the argument it would be in order for counsel to present a petition therefor, without argument, together with a brief setting forth the grounds upon which the petition was asked." The nullification of the law seems clearly enough to have been actuated by the same inducement of popular sanction and advocacy. In a few instances under the requirements of public exigency, the Supreme Court has sustained legislation of such a character as to render unfortunate the application of the rule of "stare decisis". But in the Income Tax cases the influence of public sentiment has served to relax in a measure the heretofore rigid cords of "stare decisis". If such reversal of decision denotes a loss of dignity on the part of the Court, it can not long so signify, for it will inspire popular confidence in a degree never before attained. The opinion of the Chief Justice is exhaustive and deliberate, and the dissenting opinions without exception were marked by an earnestness and

solemnity rarely observed in a dissenting opinion. It is to be regretted that a decision of such vast importance should have had the concurrence of a scant majority.

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THE NEW MICHIGAN LAW REGULATING ADMISSION TO THE BAR.—The JOURNAL calls attention to the act (*infra p. 205*), passed by the legislature just before adjournment, regulating the admission to the bar. In raising the qualifications necessary for admission to practice the legislature has rendered the profession the greatest benefit in its power. Nothing more is required of the applicant now than always should have been required, the only subject for surprise is that such a law was not passed years ago. It is incomprehensible that any state, like Indiana, should exact only a certificate of the citizenship and good moral character of the applicant. In no country in the world does the welfare of the state depend so much upon the legal profession as in our own. In fact it may be said that the whole machinery of our government is in the hands of lawyers. This is no doubt due to the fact that lawyers have shown themselves particularly fitted for taking the lead in public matters, but at the same time it proves the imperativeness of a well educated and well trained bar. The act excepts from its provisions the graduates of the law department of the University of Michigan, and while thus recognizing the high standard of the University and the excellence of its work, greatly increases its responsibility. The law provides that the examining board shall be appointed by the Governor upon the recommendation of the Supreme Court. The Supreme Court has already acted upon the law and has recommended the appointment of the following to act for one, two, three, four and five years respectively: George H. Durand, of Flint; Philip T. VanZile, of Detroit; Mark Norris, of Grand Rapids; Russell C. Ostrander, of Lansing; and Prof. Mechem, of Ann Arbor. The character of the committee leaves nothing to be desired, and now for the first time suitable tests of the fitness of applicants for admission have been established in Michigan.

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HONORS TO JUDGE COOLEY.—On Friday, the 24th of May, while millions of loyal English subjects were celebrating with enthusiastic patriotism another birthday anniversary in the long and eventful career of the good Queen Victoria, the University of Michigan was bestowing honors upon another whom not only the University and the State, but also the nation and the entire Anglicized world, love to honor—Judge Thomas M. Cooley. He too, is an exalted ruler, not as a monarch, but as one who by his profound knowledge and extraordinary mental power, has instructed and molded the minds of men almost universally. As a judge, an expounder and an author, his scholarly analysis and enunciation of those constitutional principles which tend to the attainment of the highest form of civil gov-

ernment, have won for him a pre-eminence the impress of which inevitably will grow more and more apparent with each succeeding epoch of historical development. The works of such men are a living monument, the substantial perpetuity of which, meets with no comparison in the time-faded memories of a once proud monarch.

The occasion at Ann Arbor affording so fitting an opportunity for the deserved tributes paid him by distinguised speakers, was the unveiling of a bronze bust of Judge Cooley. It was a gift to the University from the students of the law department, to the growth and attainments of which the honored one has contributed more than any other person. From its inception, Judge Cooley, as lecturer or member of the faculty, has had the welfare of the University law department closely at heart. To the University as well as to the people of Michigan, he represents more than the eminent jurist and finished scholar. Here the soft halo of fame, enveloping those who are truly great, cannot in any way dim or obscure his purity of character, his grace of manner, his generosity of heart, his high sense of honor and justice,—the insignia of a charming personality.

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THE REMOVAL OF FEDERAL OFFICIALS BY THE PRESIDENT.—Until the case of *Parsons* v. *United States* decided on April 2nd by the Court of Claims, the question whether a Federal official appointed by the President can be removed by him, and, if removed, is entitled to the emoluments of his office for the unexpired portion of his term, had never arisen in any United States court. In that case the claimant, Parsons, on February 4, 1890, was duly appointed, qualified and commissioned for four years as the United States Attorney for the Northern District of Alabama. On May 29, 1893, he was notified by the President that he was removed from his office to take effect upon the appointment and qualification of his successor. No reason for his dismissal was assigned, and he denied the power of the President to remove him and brought suit for the emoluments of his office for the remaining portion of his commission. It was held by Judge Weldon "that the term of four years as used in Sec. 769, R. S., is a limitation beyond which the officer cannot serve without a new appointment; but was not intended to limit the power of the President in the removal of officers holding Federal positions by appointment of the Executive. That the President having removed the incumbent, and the Senate having concurred in the appointment of his successor, thereby ratified and confirmed the removal of the claimant . . . and that his removal was a complete answer to his demand."

As the constitution is wholly silent upon the removal of executive officers, there was at one time considerable discussion whether the power rested entirely with the President, or whether the concurrence of the Senate by confirming the appointment of a successor to the office, were necessary. The authority of the *Federalist*

supported the latter view: "The consent of the Senate would be necessary to displace as well as to appoint . . ., those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the great permanency of its own composition, will in all probability, be less subject to inconstancy than any other member of the government "(*No. 77*). The first Congress, however, in the act for establishing the treasury department used these words: "That whenever the secretary shall be removed from office by the President of the United States, etc. The inference which this gave rise to and the uniform acquiescence in the exercise of the power by the Executive, practically decided the question in favor of the President, though until this day it had never received judicial sanction.

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Legislative Control of Municipal Corporations.—The subject of the power of the legislature over municipal corporations received further elucidation from the recent Maryland case of *Revel et al.* v. *Mayor, etc., of Annapolis.* It was there held that "the legislature had the power to provide for the erection of a public school building in the City of Annapolis, and to direct that the city authorities shall issue bonds to pay the cost of such building, and this, too, with or without the consent of the voters of the city."

The court proceeded upon the principle that municipal corporations can only exercise the powers which are delegated to them by the legislature or secured to them by the constitution. That unless prevented by the constitution the legislature may, at pleasure, abridge or enlarge their powers or even abolish them altogether. The court said: "What is a municipal corporation? It is but a subordinate part of the state government, incorporated for public purposes, and clothed with special and limited powers of legislation in regard to its own affairs. It has no inherent legislative power, and can exercise such powers only as have been expressly, or by fair implication, delegated to it by the legislature. . . . We recognize the force of the argument, that the question whether a municipal debt is to be created ought to be left to the discretion and judgment of the people who are to bear the burden, we recognize the fact that the exercise of this power by the legislature may be liable to abuse. But this abuse of a power is no argument against its exercise. The remedy however, in such cases is with the people to whom the members of the legislature are responsible for the discharge of the trust committed to them. It is a matter over which courts have no control." The conclusion of the court is undoubtedly correct for the matter of public instruction is one which touches the state very nearly, and certainly is no exception to the general rule, especially since the state constitutions universally make it the duty of the legislature to provide by taxation or otherwise a system of free public schools. The case of *Commonwealth* v. *Hartman*, *17 Pa. St. 118*, is in point, where it

was held that "to what degree the Legislature shall provide for the education of the people at the cost of the state on its municipalities, is a question which, except as regulated by the constitution, addresses itself to the legislative judgment exclusively." For other authorities see *Cooley's Const. Lim.* §§ *191, 192; Rawson* v. *Spencer, 113 Mass. 40; Adams* v. *State, 82 Ill. 132; etc.*

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RECOMPENSE TO PERSONS WRONGFULLY IMPRISONED.—It is a matter of indisputable record that innocent persons have occasionally been convicted of crime; and doubtless, now and then, one dies the death of a convict and the world never learns of his innocence. Truth, obscured or perverted for months and perhaps years, in several reported instances has revealed itself in a startling manner; a man supposed to have been murdered has re-appeared; subsequent disclosures have borne down the threads of circumstantial evidence upon which too great stress had been laid; a guilty conscience has so preyed upon the peace of the real culprit that he has sought relief in a confession. With the knowledge of the truth, sympathy for the innocent sufferer is naturally enlisted, and his pardon is soon forthcoming. But only occasionally, where an unusual hardship has been suffered, is public sympathy awakened to the extent that something more than a mere pardon is thought necessary to make amends for the injustice done to the suffering one. No legal remedy is at hand, however, and the matter is soon forgotten. The casual reader may regard this as trivial, but careful consideration should impress all with the importance of some action by the law-makers of the several States providing suitable recompense for the ignominy, pecuniary loss, and physical and mental suffering endured by the person wrongfully incarcerated. Only a few years ago the legislature of Michigan was called upon to make restitution to an innocent prisoner whose pardon had been secured. A case now pending before the Board of Claims of New York City will be watched with interest. John Roberts, of that city, in 1877 was found guilty of burglary and sentenced to imprisonment at hard labor for twenty years. Subsequently his innocence was conclusively proved and he was pardoned. A few weeks ago Governor Morton formally restored to him his rights of citizenship. For the ruin of his business, the loss of his citizenship, the disgrace and the stigma cast upon his character by reason of his arrest and imprisonment, and for the great expense incurred in defending himself and securing his pardon, he asks the State of New York to pay him $100,000. All things considered this is not an unreasonable demand. Few if any men would care to earn it in like manner. A man who suffers injury because of the wrong done him by another has his remedy. One who suffers because of the greatest of wrongs the state can do him should be provided likewise with a remedy or recourse.

# LEGAL MISCELLANY.

A BILL TO REGULATE THE ADMISSION TO PRACTICE OF ATTORNEYS, SOLICITORS AND COUNSELORS, TO PROVIDE FOR A BOARD OF EXAMINERS, AND TO REPEAL CONFLICTING ACTS.—(7195) Section 1. The People of the State of Michigan enact, That any person graduated from the law department of the University of Michigan after the passage of this act, having taken the full prescribed course in said department, shall be admitted to practice at the bar of all the courts of this State, upon the production of his diploma, duly issued by the board of regents thereof. Such graduate may be admitted to practice by the supreme court or any circuit court of the State of Michigan, on motion. And upon taking the constitutional oath, the clerk will issue under the seal of the court a certificate of admission to the bar.

Sec. 2. Practicing attorneys residents of other states and territories, or from foreign countries, may be admitted on motion to try cases in any of the courts of this State by such courts, but shall not be admitted to the general practice of law in this State without complying with the provisions of this act: Provided, That where the applicant shall furnish the supreme court a certificate of admission to practice in the court of last resort of any state in the union, or a certificate of admission to the circuit or district courts of such State, together with the recommendation of one of the judges of the court of last resort of such state, said supreme court may, in its discretion, if satisfied as to his qualifications, admit such person to practice on motion made by some member of the bar of said court.

Sec. 3. Every other person who shall be of full age, a resident and a citizen of the United States and of good moral character, may be admitted to practice as an attorney and counselor at law, and solicitor and counselor in chancery in all the courts of record of this State on motion made in open court, but the applicant shall first produce the certificate hereinafter provided for from the board of examiners, to be appointed by the Governor upon the recommendation of the supreme court of Michigan, that he possesses sufficient learning in the law, and moral character and ability to enable him to properly practice as an attorney and counselor at law and solicitor and counselor in chancery in the courts of this State. No person shall be entitled to practice as an attorney and counselor at law and solicitor and counselor in chancery in this State until he shall be licensed so to do by said courts. No person shall be denied admission to practice as an attorney and counselor at law and solicitor and counselor in chancery on account of sex.

Sec. 4. The Governor shall on the recommendation of the supreme court, and on or before the first day of July, one thousand eight hundred and ninety-five, appoint a board of examiners, com-

posed of five competent lawyers of this State, for the examination of applicants for admission to the bar, whose term of office shall be as follows: One for one year, one for two years, one for three years, one for four years, and one for five years, and thereafter each year the Governor, on like recommendation, shall appoint one member of the board of examiners for the term of five years. Such board shall meet at the capitol, in the city of Lansing, at least four times in each year, and during the session of the supreme court, and also at other times and places in the State, if the supreme court shall so direct, for the purpose of examining all applicants for admission to the bar, as to their legal learning and general qualifications, to practice in the several courts of this State as attorneys and counselors at law, and solicitors and counselors in chancery, and upon such examination being had, the board shall issue to such applicants as shall pass the required examination, the certificate of qualification stating the standing of the applicants and recommending their admission to the bar. Such board shall elect from their number a secretary and a treasurer, and shall make such rules and regulations relative to said examinations as to them may seem proper. The president of said board shall be the member whose term of office soonest expires. The postage, stationery and printing required by the members of the board in the discharge of the duties of their office shall be a proper charge against the State and shall be audited and allowed by the Board of State Auditors on vouchers approved by the president of said board. Three members of said board shall constitute a quorum for the transaction of business.

Sec. 5. The residence and name of the applicants shall be made to appear to said board by affidavit and satisfactory evidence shall also be produced by such applicants of their good moral character and of their having pursued the study of the law in the office of some attorney or in some recognized law school or university for at least two years prior to such examination; and a fee to be fixed by said board of not more than ten dollars shall accompany the application. The applicant shall be required to submit to a written examination, which shall be prepared by such board, also an oral examination by the board, and shall be required to answer a minimum of 70 per cent of the questions given him to entitle him to the certificate of the board. The board shall, however, have power to establish such higher grades of standing as to them may seem proper.

Sec. 6. The examination papers shall be kept on file in the office of the secretary of the board, and a record kept of each application and the name of the applicant and his qualifications and general standing as ascertained by each examination, and the secretary of the board shall furnish each applicant with a card, showing the proficiency he has attained in each branch or subject upon which he has been examined, whether a certificate is issued or not. Any applicant failing to pass the examination may again apply after six

months, by showing to the board that he has diligently pursued the study of the law six months prior to the examination, and shall not be required to pay an extra fee for the second examination.

Sec. 7. The board of examiners shall receive as compensation for their services ten dollars per day for the time actually spent and the necessary expenses incurred in the discharge of their duties as examiners, in going to, holding and returning from such examination, to be fixed and certified by the clerk or one of the justices of the supreme court: Provided, however, That all compensation for services and expenses shall not exceed the amounts received as fees from applicants.

Sec. 8. Sections 26, 27 and 32 of chapter 95 of the revised statutes of 1846; section 1 of act No. 67 of the session laws of 1848; act No. 189 of the session laws of 1849, the same being sections 7173, 7174, 7177, 7193 and 7195 of Howell's annotated statutes, and all other acts or parts of acts so far as they may conflict with this act are hereby repealed.

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In the case of Judge Long against Commissioner Lochren of the pension bureau, the District of Columbia court of appeals on June 5 reversed the decision of the district court which denied the right of the commissioner to reduce Judge Long's pension. The court of appeals held that the grant of a pension is not a vested right which does not admit of reduction or diminution; that the pension authorities may reverse, suspend, or alter in any way a pension granted by their predecessors. The decision if upheld by the supreme court, to which an appeal will be taken, will affect hundreds of cases where pensions have been reduced by order of the commissioner.

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CONSTITUTIONAL LAW—RAILWAY COMPANY—REGULATION OF FARES—REASONABLENESS.—Plaintiff below sued a railway company under a statute which fixed the maximum rate of fare at three cents a mile, and which gave a penalty to the passenger for each overcharge. The company made offers tending to prove that the statutory rate was unreasonable, as under it the company was unable to pay the interest on the capital invested. The offers were ruled out, and plaintiff had judgment, which was affirmed by the Supreme Court of Arkansas, and, on error, by the Supreme Court of the United States. *St. L. & S. F. Ry. Co.* v. *Gill*, 15 Sup. Ct. Rep. 484. The act incorporating the company which built the road originally authorized a charge of five cents a mile, and defendant, having succeeded to the franchise by a mesne conveyance, claimed the same privilege. The court held that the right to fix the fare did not accompany the property in its transfer to a purchaser, in the absence of express provision to that effect in the statute, citing *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; and *Railway* v. *Miller*, 114 U. S. 176, as authority.

# *RECENT MICHIGAN DECISIONS.*

AGENCY—NOTICE TO STATE AGENT NOTICE TO COMPANY—Where it appears that a state agent has vested in him the general powers of a state agent in regard to the supervision of the business and local agents, a notice to him of the expiration of a contract of hiring would be notice to the company. *Life Ins. Co.* v. *Smith et al.* (May 21).

APPEAL—BOND OF CORPORATION—SEAL—1. Pub. Acts 1893, No. 162, providing that corporations "may have a common seal," does not require them to have such seal; and an appeal bond executed by a corporation with the usual scroll is sufficient. 2. One having the general management of a corporation is authorized to execute an appeal bond for it. *Sarmiento* v. *Davis Boat & Oar Co. et al.* (May 21).

CONTRACTS—QUANTUM MERUIT—Plaintiff sued to recover for a breach of a contract, by the terms of which he was to receive a certain amount for cutting, hauling, and delivering certain timber upon defendant's land. The contract contained a stipulation to the effect that a scale of logs made should be final and conclusive as to the quantity of timber cut and delivered. *Held:* That in an action for the breach of such contract caused by defendants' refusing to permit plaintiff to continue in its performance, the agreement fixed upon by the parties for determining the quantity of logs actually cut and delivered, would be binding and conclusive, and in the absence of fraud or gross error would be conclusive evidence upon that subject. *Eakright* v. *Torrent.* (May 21).

CRIMINAL LAW—FRAUDULENT DISPOSITION OF FUNDS—In a prosecution against a supervisor for a fraudulent disposition of certain moneys paid him by order of the Board of Supervisors to be expended for a specified purpose, *held*: That a conviction based solely upon proof of payment of the money to him upon the theory that the order of the Board was void, can not be sustained. The indictment having treated the order as valid, the accused had a right to show what disposition had been made of the funds. *People* v. *Fairchild.* (May 21).

DISBARMENT—PROCEDURE—In disbarment proceedings defendant is entitled to have the evidence examined by the court, so that the falsity of the charges may be determined authoritatively. *In re Chandler.* [May 7].

ELEVATORS—Where provision is made for the carriage of persons in a passenger elevator, one who, with knowledge of that fact and without invitation rides in an elevator used solely for the carriage of freight, does so at his own risk. *Amerine* v. *Porteous et al.* (May 21).

FORECLOSURE OF MORTGAGE—ALLOWANCE OF ATTORNEY'S FEES—A stipulation in a mortgage for attorney's fees other than those expressly sanctioned by statute, is void. Chancery Rule 90, made under authority of 2 How. Ann. Stat. §6623, authorizing the supreme court to establish rules of practice for the circuit court in chancery, regulates the imposition of costs, and restricts the power of such courts in imposing attorney's fees. *Kittermaster* v. *Brossard et al.* [April 30].

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES—When a wife leaves her husband without just cause and with the avowed determination of securing a divorce that she may remarry, the husband is not liable to third person for necessaries furnished her while away from his home. A decree of divorce granted subsequent to such removal is, as to the parties to that litigation, final and conclusive as to the finding of facts, but not between the husband and a third person suing for necessaries furnished such wife. There being evidence tending to show that the removal of the wife from her husband's home was not only connived at by the person suing but that he had knowledge that such desertion was without justification or excuse, it was not error for the court to instruct that no recovery could be had. *Corry* v. *Lackey.* (May 21).

JUSTICE COURT APPEAL—BOND—An appellee in an appeal from Justice Court, in moving to dismiss in default of a new and sufficient bond, does not release his right under the former bond until the order of the Court has been complied with and a new bond filed. *Hascall* v. *Brooks.* (May 21).

LANDLORD AND TENANT—EXTENSION OF LEASE—NOTICE—Where notice is required of the lessee's intention to claim an extended term, notice must be given or the intention must be otherwise manifested, a mere naked holding over is insufficient to warrant a finding that the lease has been extended. *Cooper* v. *Joy et al.* (May 21).

LANDLORD AND TENANT—LEASE BY EXECUTOR—As between an heir and a lessee holding under a lease executed by an executor under Sec. 5875, How. Stat., a lease cannot be held void on the ground that the personal estate of deceased is ample to pay the debts and liabilities. A lessee under this section, cannot be required to ascertain at his peril, whether an estate is solvent, before contracting, where the executor is in apparent control of the land, and able to give possession. He has the right to make a lease for one year and therefore a void lease for two years will be valid as a lease from year to year. *Grady* v. *Warrell* (May 21).

PETITION IN INTERVENTION—PERMISSION TO FILE—NUNC PRO TUNC ORDER—1. Though an intervener should first obtain permission from the court to file his petition, yet the Court may, by order nunc pro tunc, authorize and validate the filing of a petition filed without permission. 2. An order refusing to strike from the files a petition of intervention, filed without permission of the court, and an order overruling a demurrer thereto, are together equivalent to a nunc pro tunc order granting petitioner permission to intervene. *People etc.* v. *Ingham Circuit Judge.* (May 7).

RAILROAD COMPANY—LACK OF CONTRIBUTORY NEGLIGENCE MUST BE AFFIRMATIVELY SHOWN—In an action against a railroad company for the negligent killing of an employe, where there is an entire absence of evidence tending to show what deceased was doing at the time of the accident, it is not sufficient to show that one conjecture in regard thereto was more probable than another, there must be some evidence to show that he was in the exercise of due care in order to justify a recovery. An employe cannot complain of the imperfect condition of a road he is employed to make perfect. He must take the risk naturally incident to such employment. Where a servant is employed to put a thing in a safe and suitable condition for use it is unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment. *Manning, Ad'm* v. *Railroad Co.* (May 21).

STATUTE OF FRAUDS—VERBAL ACCEPTANCE OF ORDER—A verbal acceptance by a debtor of an order drawn on him by a creditor cannot be sued on because such obligation is within the Statute of Frauds and therefore void. *Upham* v. *Clute.* (May 21).

TAXATION—ASSESSMENT—The omission of the word "auction" in a certificate required by a city charter to be attached to the tax roll, making the document read "at forced sale," instead of "at forced auction sale," will not render the assessment roll invalid. The object of the law being fully met by the use of the broader term, "forced sale." *Mining Co.* v. *City of Negaunee.* (May 21).

TAXATION—"ASSESSED," CONSTRUED—A vendee in a contract for the sale of timber agreed to pay all taxes, with the stipulation that upon notice being given that all the timber had been removed, he should not be liable for taxes assessed after the date of service of such notice. *Held:* That a listing of the lands for taxation prior to the giving of such notice would not render the vendee liable for such taxes. The word "assessed" includes all the steps necessary to be taken in the legitimate exercise of the power of taxation, and that a mere listing of the lands for the purpose of taxation is not a completed assessment. *Rothchild* v. *Beyole et al.* (May 21).

## BOOK REVIEWS.

DIGEST OF INSURANCE CASES.—Embracing the decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident and Assessment Insurance, and affecting Fraternal Benefit Orders. For the year ending Oct. 31, 1894. By JOHN A. FINCH of the Indianapolis Bar. The Rough Notes Co., Indianapolis, Ind., 1894.

This digest containing as it does the points of all the decisions on insurance published in the United States, Canada and Great Britain, will be found to be most useful not only to practitioners but to all interested in insurance. This is the fourth annual volume and digests about four hundred and fifty cases. The number of cases construing policies is one hundred and fourteen; this must be discouraging to the companies who spend so much time endeavoring to write their contracts not only so that they may be understood but so that they cannot be misunderstood. The index and general typographical construction of the volume are excellent.

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THOMPSON ON CORPORATIONS—Commentaries on the Law of Private Corporations. By SEYMOUR D. THOMPSON, LL. D. SanFrancisco: Bancroft-Whitney Company. Six vols., 8 vo. $36.00.

The fact that Judge Thompson was preparing this work was announced some time ago, and the appearance of the first volume has been awaited by the profession with interested expectancy. We have received the first three volumes and after careful examination can frankly say that our great expectations are being more than realized. There is something about all of Judge Thompson's writings that awakens the interest of the reader. He is original both in style and thought. This is especially noticeable in this work, even on the dedicatory page and in the preface. He reserves the former for a public acknowledgement to his hardly less distinguished companion in literary labors, Leonard A. Jones In his preface he points out the reasons that have necessitated a material change in the plan and size of the work which he undertook more than sixteen years ago, and which was announced in 1883 to be in three volumes. It is well perhaps, that the culmination of his labors has been delayed. The law of corporations has been subject to constant and material changes. Entirely new theories have arisen regarding some important branches of the subject. Then, too, the author has in the interim been afforded the experience of twelve years upon the bench of an important appellate court. During his judicial career he has been able to observe the development of the law upon all the various branches of this great subject, and to note the causes and conditions that have brought about the present status.

The arrangement of the work is excellent. While it is certainly voluminous in a certain sense of the word, yet it is not bulky nor "padded". Though we have not the index volume, no trouble at all has been experienced in finding the author's exposition of any desired topic, so admirable is the complete analysis of the whole work given in volume one, and so exhaustive and comprehensive the table of contents at the beginning of each volume. The work is divided into nineteen titles, each title comprising several chapters. Of the latter there are in all two hundred and one. Many of these chapters were found to be so large that a division into sub-chapters, called articles, was deemed necessary. These articles are, in several instances, again divided into subdivisions. The whole work is again divided into about eight thousand paragraphs, called sections. "These sections", says the author, "form the units of grouping, of reference, and of indexing." Volume I. contains 1008 pages of text, and twenty-three chapters. It comprises the whole of the first title and about one half of the second; the portion of the subject treated being the organization and internal government and capital stock. The other volumes each contain a few pages more of text. Volume II. contains twenty chapters in which are considered subscriptions to capital stock, remedies and procedure to enforce share subscriptions, and the treatment and consideration of shares as property. Volume III. begins with the fifth title and treats of the liability of stockholders to creditors and of the powers, duties, rights and liabilities of directors. This is done in forty-three chapters.

The three succeeding volumes are to treat the remaining twelve titles in one hundred and sixteen chapters. If the volumes yet to be issued cover the topics left for consideration as thoroughly as the present volumes cover what has been treated in them, the distinguished author may then be content to rest from his labors and leave this as the crowning work of his life.

# CURRENT LITERATURE.

The *Review of Reviews* for June has an article on an interesting phase of student life in the smaller Western colleges—the oratorical contests. The portrait of the successful competitor in the recent intercollegiate contest at Galesburg, Ill., is given, with extracts from his oration and from that of the speaker who won second place. The former represented Knox College, Ill., and the latter Beloit College, Wis. These contests have been held for twenty-two successive years.

The May numbers of *Littell's Living Age* are especially valuable from a political standpoint, giving as they do the political situation in several important countries. "The Case for Sweden," "China's Extremity," "The Situation in Italy," "The Political Situation in France," are topics of special note. "The Decline of the House of Commons," by Sidney Low, is written to substantiate some of the facts set forth in an article entitled "If the House of Commons were Abolished," which appeared in a recent number of that magazine.

There is quite a flavor of the Orient in the June *Atlantic*. Lafcadio Hearn contributes In the Twilight of the Gods, a study in Japanese josses, and Mary Stockton Hunter has a poem, A Japanese Sword-Song. Among the reviews are Lafcadio Hearn's Unfamiliar Japan, and Out of the East; Religions of Japan, by W. E. Griffis, and Occult Japan, by Percival Lowell.

Among the illustrated articles in the June *Popular Science Monthly* is an interesting description of "Journeying in Madagascar", extracted from Frank Vincent's book, entitled Actual Africa. This gives a vivid picture of Home Life in the island. The Psychology of Woman" by Prof. G. T. W. Patrick, of the University of Iowa, is a unique paper, treating the subject in the light of the physiological structure of woman. "The Decline in Railway Charges" is the title of a carefully prepared paper by H. T. Newcomb. It goes to show that freight charges in railway transportation have been reduced to the lowest rate possible until legislative restraints upon consolidation be removed.

The June *American Magazine of Civics* contains a varied list of instructive articles. Among them are: "Progressive Individualism," by John R. Commons; "Woman's Part in Political Sins," by Ella W. Winston; "The Issue in Ninety-six," by A. J. Warner; "Jury Reform," by Horace F. Cotter; "Why Municipal Reform is a Failure," by Charles E. Burton.

"Power and Wealth of the United States" is the title of the opening article in the June *North American Review*. The writer, Michael G. Mulhall, the noted foreign statistician, very forcibly maintains that ours is the greatest power producing country in the world. Senator Henry Cabot Lodge discusses the infringement of the Monroe Doctrine in the present action of England towards Venezuela. The "Military Lessons of the China-Japanese War" are ably set forth by Secretary Herbert.

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## *PROGRESSIVE CONSERVATISM.*

CHARLES FLOWERS.

Law, as an abstract principle, uncontrolled by elements which war against good government, is conservative. It is without sentiment or feeling, or prejudice or passion. It is calm and indifferent and cold. It underlies all relations between man and man, between man and men, and between the individual and the state. The simplest of all principles, it is considered by many to be the most complex.

This conservatism is not stagnation, nor fixedness nor unchangeableness. On the contrary, it is progression, in the truest and most healthful sense in which the word progression can be used. It is governed by the principles that control progression in the natural world, the principles of evolution. These include natural selection, the struggle for existence and the survival of the fittest.

The theory of evolution finds no stronger confirmation than in the enactment of laws, when the law-making power is intelligent and incorruptible. Necessity always exercises its inexorable demand in nature by the creation or development from existing materials of the thing needed, and its demand is met by repeated failures and the production of undeveloped and worthless forms. The die is many-sided, and must be thrown many thousands of times before the required figure is uppermost; but it is always loaded, however lightly, and the final successful throw is never the result of chance. The under surface, which controls the result, is the conservative force, apparently silent, inactive and unyielding. But in the enactment of constitutions and laws, and in the efforts made for modifications necessary to meet the constantly shifting conditions of society, the forces which must be overcome are not the

stolid and indifferent forces of nature, which are obstructive simply because they exist, but there intervenes an active and progressive principle of individual and corporate selfishness. To destroy this principle and to preserve the honest, manly conservatism of the law, will, in the future, require the exercise of great wisdom and cool and deliberate judgment upon the part of those who are entrusted with the grave responsibilities of legislation. The theory of the survival of the fittest, unless men of integrity and intelligence shall be willing to devote a large portion of their time to the transaction of public affairs, will degenerate into a principle which means the survival of the strongest, and finally into the survival of the most unscrupulous and corrupt.

The most powerful of all influences necessary to preserve the conservative evolutionary principles referred to, is intelligence. If as much care were taken in the selection of legislators as an individual or private corporation takes in the selection of employees, the meeting of a legislature would be cause for congratulation and hope and its adjournment cause for regret; but when men are chosen who would not recognize the constitution if they should stumble over it upon the steps of the capitol, who receive their opinions from hired lobbyists, and have to be "retained" before they can investigate important questions; in other words, when institutions for feeble-minded, and the penal institutions of the state are deprived of their natural inmates, in order that legislative halls may be filled, there is great danger that progressive conservatism, the sheet anchor of representative government, will not be able to hold the great ship in the storms which are to come.

Through all the trials and vicissitudes of representative government, the hopeful look to the courts, as the faithful turn their faces towards Mecca. The responsibility resting upon members of the legal profession as advocates and counselors and judges, is the most solemn responsibility which anyone can be called upon to assume. The crowding of the profession, the commercial and trade-like character of those who call themselves lawyers, and the impudent clamoring for office by impecunious, venal and ignorant men, cannot fail to retard the growth of the progressive conservative principle which underlies the enactments of legislatures and the decisions of inferior and superior tribunals. That we have so far escaped the consequences which must follow from these sources, is cause for profound congratulation.

A great enemy of the principles of progressive conservatism as

applied to the decisions of courts, is the blind admiration and unreasonable adherence to precedents; but while this is an enemy, it is not greatly to be feared, for the impelling force is far greater than the retarding. Every decision of every court should be a bantling, cast upon the rocks, to be nurtured by the she-wolf, and not taken into the palace and clothed in purple and fine linen. If possessed of elements of strength and virility, it should live; but if puny and imbecile, it should die and be forgotten. There are many lawyers, and some judges, especially of inferior courts, whose minds are never refreshed by the entrance of an original thought or impression, but they must wait for inspiration from some decision of some court, and it may be that a careful analysis of such decision would disclose the fact that it was as closely allied in principle to the question under consideration as the president of the Peace Congress is to the King of the Cannibal Islands. There are others who know what is right, but lack the courage to pronounce a just judgment, because confronted by a decision of another court which they receive as authority. If such decision were criticised as it should be, and condemned as unworthy to survive, it could not long interfere with the natural and conservative evolution which is going on with such apparently unseen, yet with such certain forward movement. If the decision of the supreme court is wrong in principle, it should not be followed. If when weighed in the balance, it is found wanting, if, when tried in the furnace, it is proven to be impure, it should be returned to the shop from whence it came. It is not authority, it is simply precedent.

To receive every precedent as authority would be in effect to seal up the fountain of judicial learning and to accept mediocrity as wisdom, to close the mouth of fearless criticism and to make lawyers and judges mere parrots, to require of the present that it shall repeat not only the wisdom, but also the follies of the past.

All of nature's processes are slow, but its work is complete. The operations of man are rapid, and his labors are imperfect. That which was built yesterday will be torn down to-morrow, unless the foundation is firm and the superstructure enduring. The great enemy of steadfastness is haste; the companion of haste is overwork, and overwork means a dull brain and an unsteady hand. Byron may have dashed off an impassioned and brilliant poem in a single night; but every line of the Elegy of Gray carries with it the impress of the author's familiar companionship.

Sooner or later, and the sooner the better, the Supreme Court

of this State must be relieved from the burden of labor which must be a constant reminder that each day brings an added toil. They must be free to tear down that which has been carelessly builded, and erect a modern structure, suited to the changed conditions and imperative demands of the present life. The intelligence and integrity of its members are a sufficient guaranty that we can hopefully look to them, that the necessary conservatism of the law shall be the conservatism of progress and life, and not of stagnation and death.

# STATE REGULATION OF THE PAYMENT OF WAGES.

W. A. COUTTS.

Among the many laws responsive to the demands of social reformers and agitators, those regulating the payment of wages are conspicuous. Within the last decade a large number of the states have provided that employees in certain specified businesses be paid in current coin or in instruments redeemable therein. The statutes in many states go further, requiring payment to be made weekly or semi-monthly. In a few cases regulation as to the medium of payment extends not only to certain specified businesses, but to all.

As to the expediency and constitutionality of these laws, there is much conflict of opinion. On the one hand reformers of the semi-socialistic type urge that legislation regulating the payment of wages is constitutional, and that the health of the body politic demands it. On the other hand extreme individualists assert that, sociologically considered, such legislation is retrogressive, and moreover that it is in direct contravention of the constitution of the United States.

It is the constitutional question which here alone concerns us. The purpose is to inquire what constitutional basis there may be for legislation prescribing the time and the medium for the payment of wages.

The courts which have upheld the statutes regulating the payment of wages, (1) have done so mainly on the ground that such regulation is a legitimate exercise of the police power of the states, and necessary for the maintenance of just relations between soulless corporations and their employees. On the other hand the central position of the courts which have declared such statutes void has been that they are repugnant to the fifth and fourteenth amendments to the Federal Constitution, as they unduly encroach upon the liberty of the individual guaranteed by these amendments. (2)

1. Peel v. State, 36 W. Va. 802; Hancock v. Yaden, 121 Ind. 366; Shaffer v. Union Mining Co., 55 Md. 74, 54 Ohio St. 572, 17 L. R. A. 387.

2. Goodcharles v. Wengman, 113 Pa. 431. The court in referring to the Stove Act passed by the legislature of Pennsylvania, June 29, 1881, made use of the following vigorous language: The Act is an infringement alike of the liberty of employer and employee. More than this, it is an insulting attempt to put the laborer under legislative tutelage, which is not only degrading but subversive of his rights as a citizen of the United States. He may sell his labor, for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law which proposes to prevent him from so doing is an infringement of his constitutional privilege and consequently vicious and void.

The difficulty is to draw the line between regulation necessary for the comfort, welfare and safety of society, and regulation that unlawfully infringes the liberty of the units that compose society. The Spirit of the Constitution stands sentinel to guard alike both personal freedom and the general welfare, but where the two conflict, or seem to conflict, its mandates are obscure As a consequence upon the question of the validity of statutes regulating the payment of wages, we find the authorities almost equally divided.

In view of the conflict of authority in the United States, and in view also of the fact that the Spirit of the Constitution is the spirit of English liberty, it may be instructive to trace English labor legislation and inquire into the attitude of the English courts to such legislation. Of course over a field so broad only the most cursory glance can here be given. But the mere turning of the pages of the statute books shows that Parliament from its earliest organization down to the present day has never ceased attempting to regulate the payment of wages. (1) For centuries indeed as is well known it attempted to regulate not only the payment, but also the price of labor; but as Prof. Thorold Rogers points out in his "Chapters on Work and Wages," it conspicuously failed in the attempt. Parliament initiated its efforts to control wages by enacting the first of the famous, or rather infamous, Statutes of Laborers. The barbaric stringency of these statutes had of course no parallel in modern legislation. By 34 Ed. III. the laborer who had taken wages in excess of the prescribed limit was to be outlawed in his own country, and when taken fugitive in another, returned, imprisoned and branded on the forehead with a hot iron. Statutes little less severe continued to multiply until the reign of Queen Elizabeth, but their repeated amendments and re-enactments indicate that they failed to accomplish their purpose. Their failure, indeed, was inevitable, for in many instances the maximum wage allowed the laborer, would, through the rise in the price of food, scarcely have maintained him in a condition fit for labor of any kind. (2) It does not appear that the judges of those days made any effort to assert the principles of the Great Charter in behalf of the oppressed toilers. Magna Charta indeed had not been intended for the laborer. In the reign

1. 2 Ed. III, Ch. 3, 34 Ed. III. 12 R. II, Ch. 6, 3 Ed. IV. Ch. 5. 2 & 3 Ed. VI, Ch. 15, 6 Hen. VIII, Ch. 3. 5 Eliz. Ch. 4. 1 Jas. 1, Ch. 6. 8 & 9 W. III, Ch. 36. 1 Anne Ch. 18. 9 Anne 30. 12 Geo. I, 34. 13 Geo. II, 8. 22 Geo. II, 27. 19 Geo. III, 349. 1 & 2 W. IV, 37. 5 & 8 Vic. 91. 37 & 38 Vic. 48.

2. Green's History of the English People, 249. Six Centuries of Work and Labor—Thorold Rodgers. Essays on Black Death. Fortnightly Review, 1865.

of John the free laborer was unknown. The villeins from which class he afterwards emerged were mere chattels annexed to the land, or to the lord's person, and transferable at his will. (1) When, therefore, Magna Charta declared that no freeman should be imprisoned, dispossessed or outlawed, or in any way brought to ruin save by legal judgment of his peers, or by the laws of the land, it was not contemplated that the villeins should ever come within the category of freemen.

It is then of no significance as bearing upon their constitutionality that the odious statutes of laborer's so long passed muster in the courts. No such statutes could now be passed in England. The ballot of the British laborer, and modern ideas of justice forbid it. Nor, were such legislation possible, can we doubt that even in England, where Parliament is supposed to be supreme, the courts would declare it void. For says Lord Coke in *Bonham's Case, 8 Rep. 118 a*, "The common law will control Acts of Parliament and sometimes adjudge them to be utterly void. For where an act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void."

But although such flagrant encroachment on personal liberty as was sanctioned by the Statutes of Laborers, is now, we may hope, impossible, yet in England legislation regulating the payment of wages has gone steadily on. (2) Modern acts, however, for this purpose have been at least avowedly in the interests of the laborer. Their main purpose has been to prevent the payment of wages in goods, or otherwise than in the current coin of the realm, in order to check fraud and imposition on the part of the employer. Their aim is thus indentical with that of the statutes regulating the payment of wages in the United States. The English statutes have however, been confined in their application to such industries as the manufacture of linen, cotton and woolen goods, where the large number of employees is supposed to offer special facilities and temptation to the employer to pay wages with goods supplied at exhorbitant prices. In England as in the United States infringement of the statutes is punishable by fine, and in some cases, imprisonment. This is surely a severe penalty for what seems, and indeed must often be, the innocent exercise by adults of the right of free contract.

1. Blk. Comm. B. II, 93.

2. 8 & 9 W. III, Ch. 36. 1 Anne Chap. 18. 9 Anne 30. 12 Geo. I, 34. 13 Geo. II, 8. 22 Geo. II, 27. 19 Geo. III, 49. 1 & 2 W. IV. 37. 6 & 7 Vic. 68. 8 & 4 Vic. 91. 7 & 9 Vic. 47. 37 & 38 Vic. 48.

Nevertheless it does not appear that English courts have regarded these statutes as unwarrantably interfering with personal liberty. They have rather looked upon them as a legitimate, though perhaps an excessive exercise of the police power. Convictions under them have been rare, and they have been, in some cases at least, liberally construed in favor of free contract. (1) It is quite certain, however, that the English judiciary have not regarded them as "against common right" and therefore, according to Lord Coke, void. (2) There seems to be nothing then, either in the acts of the British Parliament or in the decisions of the British courts to support the view taken by some of the courts in the United States, viz; that statutes regulating the payment of wages are void, as depriving citizens of their liberty and property without due process of law. On the contrary the fact that such statutes continued to multiply while the laisser faire doctrine was at its height in England, must tend to weaken the position of the American courts which have taken that view. (3) The verdict of the lawmaking part of the English people is that these acts are not contrary to the spirit of free government. English judicial opinion is to the same effect. Hence notwithstanding the vigorous assaults upon all such legislation by philosophers like Herbert Spencer, English influence must be regarded as supporting those who hold such legislation valid under the Constitution of the United States.

The personal liberty clause in our Constitution, which it is contended forbids acts regulating the payment of wages, reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law".

Since it is against corporations that most of the acts in the United States regulating the payment of wages have been directed, it is important to decide whether corporations are persons or citizens within the meaning of the Constitution. Although decisions are in conflict yet the weight of authority holds that they are. (4)

1. Cutts v. Ward 2 Q. B. & B. 357. Willis v. Thrope 10 Q. & B. 383. Smith v. Walton 3 C. P. D. 109. L. R. 20, Q. B. 606. 21 L. J. Q. B. 151.

2. Bonham's Case, 8 Coke's Rep. 118.

3. Adam Smith declared such legislation just and equitable. Wealth of Nations, bk. I Ch. 10, quoted approvingly by J. Bramwell in Archer v. James, 2 Best & S. 89.

4. M. & S. P. R. R. Co. v. Beekwith, 129 U. S. 26; M. P. R. R. Co. v. Mackey, 127 U. S. 205; M. & S. P. R. R. v. Herrick, 127 U. S. 210. Santa Clare Co. v. S. Pac. R. R. Co., 118 U. S. 394; Phoenix Ins. Co. v. Com. 5 Bush. 68; Warren Mfg. Co. v. Aetna Ins. Co., 2 Paine 501.

It is well settled, however, that corporations enjoying special privileges are subject to special regulations. (1) Yet the regulation must not be arbitrary; it must be police regulation necessary for the "comfort, welfare and safety of society;" and it is difficult to see wherein the interests of society demand regulation of the payment of wages when the employer is a corporation and not when the employer is a private person. Yet some of the courts seem to have taken this view. In 55 Md. 74, Mr. Justice Miller says: "It being conceded that the legislature when it incorporated the Union Mining Co., reserved the right to amend or alter its charter at pleasure, there can be no doubt that the legislature can enact a law, prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation making contracts with them for payment in anything but money. It was also entirely competent for the legislature as one of the means of securing observance of the law, to withdraw from the appellees the right of set-off (in a suit against them for wages), for goods sold their employees in contravention of the act." (2) As Justice Miller points out, the legislature had reserved the right to amend the charter of the incorporation at pleasure. This reservation would seem a sufficient basis for any amendment affecting only the corporation and the state. It avoids the effect of the clause in the Constitution forbidding the state to impair the obligations of contracts; but what basis does it give for legislation to prevent adults making with a corporation a contract quite legitimate if made with an individual engaged in the same business? The better opinion seems to be that such legislation in spite of any reserved power to amend is class legislation and void. (3) Where a business is affected with a public interest it is also like a corporation, subject to special regulation. Common carriers, ferrymen, hackmen and warehousemen, are on this ground, limited to a certain maximum charge for their services; and there is now no question as to the validity of the statutes fixing the maximum charge. (4) But the ground on which these statutes are up-

1. 153 U. S. 446. 133 U. S. 375. 9 Cast. 604; 94 U. S. 605. 116 U. S. 307. 128 U. S. 174. 94 U. S. 113. 143 U. S. 517. 117 N. Y. 1. 60 Ill. 80. 140 U. S. 226. 47 Ohio St. 409. 24 N. E. R. 1072. 43 Wis. 449. Cooley's Con. Lim. p. 719, 4 ed.

2. Statutes regulating the payment of wages may be found as follows:—1. Regulations as to time of payment Cal. Laws, 1891, p. 195. Ill. 1891-213. Ind. Laws 1891-85. Kan. Laws 1893-2701. Mass. Laws 1891-239. Ohio Laws 1888-251. R. I. Laws 1891-918. 2.—As to mode of payment. Ark. Laws 1889-76. Md. Laws 1880-273. N. C. Laws 1891-515. Ohio Laws 1893-55. Ill. 1891-212.

3. Tiedeman, Limitations on Police Power, p. 584. 16 Pik. 126. Braceville Coal Co. v. People (Ill.) 22 L. R. A. 540.

4. Almutt v. Inglis, 12 East. 527. Cooley, Con. Lim. 744, and cases cited.

held seems quite inadequate as a basis for those regulating the *payment of wages* because the business is affected with a public interest. Special or class legislation must subserve the general welfare. (1) It is clear that public interest demands fair charges from railroad companies, ferrymen, hackmen, etc., and it is no objection to a statute limiting these charges, that it does not also limit the charges which a farmer may make for conveying his neighbor's wheat to market. But when it comes to regulating the payment of wages, wherein is the public more interested in the weekly payment or the payment in coin of employees, in a business affected with a public interest, than it is in the like payment of employees in any other business? (2) Here again the weight of authority seems to be that such discrimination in regulating the payment of wages is unjustifiable class legislation and void. (3)

It would seem then that the classification by legislatures of businesses for the purpose of regulating the payment of wages, only makes the annulment of their acts the more likely. Some legislatures, indeed, have foreseen this. Others have learned it from experience. Instead therefore of specifying the businesses to which their regulative acts apply, they have made them of general application. Thus the legislature of West Virginia after its statute of 1887, had been declared void (4) as class legislation, passed the following sweeping enactment: "No corporation, company, firm, or person, engaging in any trade or business either directly or indirectly, shall issue, sell, give or deliver to any person employed by such corporation, company, firm or person, in payment for wages due such laborers or advances for labor not due, any script, token, draft, cheque or other evidence of indebtedness, payable or redeemable otherwise than in lawful money." It is significant that while the act of 1887 was annulled, this one was upheld. The tendency will be to encourage not the regulation of the payment of wages in particular businesses merely, but the universal regulation of their payment. (5) Thus it seems likely that the final issue will be reduced to this simple question: May or may not the state prescribe rules for the payment of wages for all who employ labor?

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1. Cooley, Con. Lim. 6th ed. 484.
2. 155 Mass. 117. 109 N. Y. 389. 1 Abb. U. S. 888.
3. Froner v. People (Ill.) 16 L. R. A. 492. Ramsey v. People (Ill.) 17 L. R. A. 853. Braceville Coal Co. v. People, 147 Ill. 66. Low v. Rees Ptg. Co., (Neb.) 24 L. R. A. 702. State v. Loomis 21 L. R. A. 789. State v. Goodwill. 33 W. Va. 179.
4. State v. Goodwill, 33 W. Va. 179.
5. See Laws of Ohio, 1891, p. 553, Rev. Stat. of Kan. Sec. 2441.

The ultimate verdict upon this issue is still in great doubt. In passing upon the validity of an act the courts feel constrained to uphold it unless it plainly contravenes a provision of the Constitution either of the United States or of the state. All doubts must be resolved in favor of constitutionality. (1) This well established doctrine necessarily tends to the upholding of statutes regulating the payment of wages. So also does the doctrine, in its general statement never questioned, that through its police power the state may subject persons and property to all kinds of restraints necessary for the general welfare. On the other hand, when the theory of the police power is pressed into service to justify legislation interfering with the freedom of contract, many of the courts take a position as decided as that of Sir George Jessel, and in his words declare that "if there is one thing more than another that the general welfare demands, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily, shall be held sacred and enforced in courts of justice. The liberal interpretation long since given to the phrases "liberty and property" and "due process of law" (2) as used in the Constitution also favors the annulment of statutes regulating the payment of wages. The infringement of personal liberty is certainly more marked where the statutes are of general application than where they apply only to corporations, or to businesses affected with a public interest, and this has been a chief ground of annulment, even in the latter cases where the statutes were also void as class legislation. The conflict is then between personal liberty and police regulation. The aim and justification of each is the general welfare. The question is: Does freedom to contract as to the medium and time of the payment of wages, better subserve the general welfare than state regulation of that matter? Some courts have answered in the affirmative, others in the negative. Should the latter gain undisputed ascendency, then so long as the Constitution of the United States remains as it is, we shall have no more state regulation of the payment of wages.

1. Wadsworth v. N. P. E. 18 Cal. 600. (1893). Peobasco v. Raine, Ohio (June 13, 1893). Sawyer v. Dooley, Nev. (Mar. 1893). Knoxville v. Bird, 47 A. M. R. 826. People v. Rosenberg, 138 N. Y. 410. 8 Am. & Eng. Ency. of Law, p. 674. Cooley Conl. Lim. 168. People v. Gallagher, 4 Mich. 244.

2. Dartmouth College v. Woodward, 4 Wheat. 519. Kent Com. I, 10th ed. page 601. Cooley; Con. Lim. 439. In People v. Gilson Justice Peckham said: "The term liberty" as used in the Constitution is not dwarfed into mere freedom from physical restraint . . . but it is deemed to embrace the right of a man to be free in the employment of his faculties, with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare. Liberty in its broad sense as understood in the country means not only the right of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways." And in Low v. Rees Printing Co., 24 L. R. A. 702, annulling the statute passed by the legislature of Nebraska, "Labor is the primary foundation of all wealth. The property which one has in his labor is the common heritage, and as an incident to the right of acquiring property the liberty to enter into contracts by which labor may be employed in such way as to the laborer may seem most beneficial, aud of others to employ such labor is necessarily included in the constitutional guarantee.

# *MEDICAL WITNESSES.**

R. SAYRE HARNDEN, M. D.

Under this title Hon. L. A. Emery, judge of the Supreme Court of Maine, gave to the Medico-Legal Society of New York a scholarly paper, highly complimentary to our profession, at the same time pointing out from the bench some of the causes of difference of opinion and confusion in expert medical testimony.

While I concede much that is embodied in this admirable paper, as a physician, I dissent from some of the views expressed, and would add to them some further explanation of the discrepancies in medical evidence from the standpoint of the doctor. Admitting the disesteem in which expert testimony is held by the legal fraternity, I claim that it is paramount to the public esteem of the lawyer, and about as senseless. Certainly we have the best of it, as the Bible seems to have far more of praise for the doctor than the lawyer. Laying aside this inuendo from one profession to another, I believe that judges and lawyers, generally, have the highest regard for competent, unbiased, expert evidence, and that it is only the human frailty or partisan defects of medical evidence they decry. Certainly our profession feel as deeply the chagrin and opprobrium following such defects as does Judge Emery, or the distinguished New England judge, quoted by him as saying: "That medical expert evidence was *prima-facie* worthless."

That the fault lies all upon the side of the medical profession I am not ready for one moment to admit.

Judge Emery says "the court seeks enlightenment from the expert." Now, I opine, if the court were well versed in medicine, and the doctor in law, the whole problem would at once be solved, and we should have no more farcical exhibitions of expert inconsistencies.

The judge who does not understand enough of medicine to discriminate between medical evidence, based upon demonstrated scientific facts, and mere-opinion evidence, and cannot point out to the jury, for their guidance, the difference, will certainly be disgusted and ready to revile or reproach his professional brother in

*Read before the Section of Railway Surgery, Medico-Legal Society, New York, Nov. 15, 1894, and published in the Medico-Legal Journal for March, 1895.

the medical field. On the other hand, the medical expert who does not understand enough of law and the methods of lawyers to be able to discriminate proper from improper questions, and just what his rights as an expert are, will as certainly discredit his profession and himself as well.

Medicine has, to a great extent, emerged from the period of empiricism into one of approximate certainty. This fact has not yet been grasped, either by the laity or legal profession, who are slow to comprehend the great scope of modern medicine.

At this time the medical witness stands in a false position. Judges, lawyers, and jurymen regard him as a partisan.

Forrest says: "Although medical expertism is not what it ought to be, it is by no means what it is represented to be; yet it must be conceded that it has fallen from its former estate in popular opinion. The prevailing notion as to its character is due, in my judgment—he says—to impertinent and improper cross-examination, to improper rulings as to competency of certain questions, and as to the scope of cross-examination." Ignorance would seem then to be the bane of the expert, and the court as well. It has been asked, many times over, what is the cause or causes of these defects? Judge Emery has pointed out but one cause for the confused and unsatisfactory character of medical evidence aside from pure ignorance, which he does not, neither shall I, refer to, as it is the educated expert we wish mainly to discuss.

Medicine not being an exact science, too much must not be expected of her, and any general concensus of opinion, merely, is not to be expected any more than among legal authorities. This the judge concedes; what then is the cause?

Judge Emery lays great stress upon "bias or partisanship" as the principle one, forgetting for the moment, perhaps, that one of the highest tribunals created, to determine the electoral vote, in a non-partisan manner, were biased and partisan in their decision. It is human to be partisan, and no plan will ever be devised to do away with it. I affirm the causes are complex, and that partisanship is brought about by many influences, not least among which is the psychic, or hypnotic influence.

Is it hypnotism of a highly refined type of one profession by another? Certain it is the doctor is far from being in his natural element even when upon the stand as an expert; his environment is strange, and if he be not well poised and constantly and eternally vigilant he will become confused and often mislead. I have conferred

with a brother physician when we supposed we held exactly the same views, and so expressed ourselves, but as the evidence was brought out we were, in the minds of judge and jury, far apart. The doctor expressed himself subsequently as astounded at the testimony he had given. Was he hypnotized by his legal brother, or suffering from "stage fright?" He appeared calm and unembarrassed. Would the remedy proposed, while eminently wise and proper, that of selection of the expert by the court, or a conference of the experts even, prevent the apparent partisanship exemplified in this circumstance?

So we find not only that the causes are complex, but the means or methods of remedying the defects are diversified. In my opinion, based upon a careful study of the subject, and some practical experience as an expert, the remedy lies in the direction of medico-legal information upon the part of the expert, and a radical change in existing methods of obtaining medical evidence.

I understand in jury trials in England it has been the custom for sometime to have conferences of medical witnesses, and that it is not the custom there to cross-examine expert witnesses, and often only one side calls expert witnesses. Of course this implies a high standard of honor and professional knowledge on the part of the expert. If he be ignorant, or vain, it is soon apparent to all concerned. The Bible says: "Seest thou a man wise in his own conceit? There is more hope of a fool than him." Eliot says: "Vanity is the quicksand of reason;" and Shaw says: "Vanity is a strange passion. Rather than be out of a job it will brag of its vices."

There is no manner of doubt that much of the loss of esteem which has befallen the medical expert, is due to this ignorance of medico-legal subjects. The medical profession is sadly ignorant in this direction, and the chair of medical jurisprudence—mythical or as taught, a farce in our medical colleges—is largely responsible for the fact. We are left to grope our way through the mysterious labyrinths of legal methods, like a child in the forest, awed by our strange environment, and badgered by our wily legal brother, who knows more of medicine than we do of law.

The change in present methods of obtaining medical evidence should, among others, embrace the one advised by the Medical Proffession, that of selection by the Court, the compensation in no case to come from the litigants. This, while not preventing partisanship, would, in my opinion, reduce to the minimum its defects or bias resulting from it. Forrest sums up his views upon the subject of Medical

Expertism by saying: "the only adequate remedy for the evil of Medical Expertism must come from the co-operation of the legislature, the judiciary, the bar, the medical profession, and the editors of our great daily newspapers." It is generally conceded that few judges are free from partisanship. It would be inconsistent with human nature, were they not so in some measure.

Physicians are human and often of peculiar mentality. In many instances they are swerved from their own views or judgment, by the seduction, perhaps psychic or hypnotic influence of their legal brother.

I am not prepared to admit that there is often found essential and radical differences as to matter of scientific or demonstrated fact, but that the discrepancy is almost entirely confined to opinion evidence. The human mind is complex—not composite—no two mentalities just alike, how can they always think alike. They never will! but some remedy should be applied to prevent the misuse of this human prerogative. Physicians should, I think, themselves insist upon a conference between medical witnesses.

I note with pleasure that a bill has been drafted by the medical profession of Illinois, for presentation to the legislature embodying the suggestions herein made regarding the selection of experts; they advising, however, the appointment by the judge of criminal jurisdiction of persons to act as experts, such experts to hold their office for one year, or until their successors are appointed, such witnesses or experts to be paid by the county.

I fancy the peculiar psychic make-up of some medical witnesses acts in no small measure for the unreliability of and apparent contradictory character of their evidence. The learned attorney, suggestively perhaps, draws out just what he wants, not allowing the witness to state any possible view which would help his opponent, while, on the other hand, in cross-examination, he is badgered by the opposing attorney with the same object in view; between the two, if he be not the arbiter of his own fate, it is soon sealed, and he is discredited in the mind of the judge and jury, while apparently calm he may be hypnotized by his environment.

Clark Bell has wisely pointed out "how necessary it is that the medical witness should understand enough of the elementary principles of law, so that he may know how to give evidence, what are his rights, what it is proper for him to state, and what he should not state."

I conceive that a physician is a better judge as to whether a medical question is proper, than the attorney.

I believe he should answer only such questions as will help to

bring out the truth, and he should never, under any circumstances, be led into any exposition of anything that does not avail for justice and truth.

Humanity is almost miraculously benefited by the wonderful advancement in medical science in the past decade, and if our courts of justice fail to appreciate, and are not proportionately assisted in their beneficent and humane efforts for the administration of human justice, then indeed something must be radically wrong with the present legal methods of obtaining such aid from the science of medicine.

Seguin, speaking of "experts," says: "Often they are asked to testify on a case which they have never seen; they are called to answer the famous 'hypothetical question' about the case on trial—a question which is always unscientific, and often constructed solely with the view of aiding the *legal* aspects of the case, on one side or the other."

It is my opinion, he says, as it has been my consistent practice, that a medical man should absolutely refuse to answer "hypothetical questions," and should decline to give any opinion about a case he has not had the opportunity of examining,

"Under the present system (he says) medical witnesses are, I believe, inevitably biased; seldom by hope of pecuniary reward, but by the inevitable labor of the human mind, which leads us to accept and sympathize with the view of a question which is first presented to us.

We, humanely enough (he says), have a mental bias in favor of our client and his family. The bias and prejudices of juries also (he says) constitute a formidable obstacle to justice.

He says, "the legal profession is distinctly responsible for our present system of medical testimony which *masquerades* for true expert opinion.

I have invariably refused to answer hypothetical questions even when asked by the side of the case employing me as an expert. And for the reason that I never listened to one that I considered it was proper for me to answer.

A fair sample of such questions, perhaps, is this: I was asked by the attorney for plainiiff, subpoenaing me, a hypothetical question, based upon evidence given by the plaintiff, that "matter ran from nose, eyes, ears and bowels, and was vomited up; at a time when he was suffering from suppuration of knee joint and thigh." Now doctor, you have heard the evidence in this case by the plaintiff, his wife and physician, now sir, in answer to my hypothetical question, what would this matter, running, etc., mean; would it indicate absorption of matter and pyemia? My answer was, I refuse

fuse to answer the question,—(sustained by the court)—and asked to explain grounds of refusal, to which I responded, it being anatomically and physiologically impossible for such a thing to occur, as is implied in this question, I refuse to state what the mere supposition that it occurred would indicate.

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## *NOTES.*

THE MICHIGAN STATE BAR ASSOCIATION held its annual meeting at Lansing on June 25th. The session was an interesting one despite the fact that the general apathy of the members of the State bar toward the official organization was painfully manifest in the attendance of less than forty attorneys. The following papers were read: "Some Results of the Dartmouth College Case," George P. Wanty, of Grand Rapids; "The Progressive Conservatism of the Law," Charles Flowers, of Detroit; "A Critique on the Jury System and Suggestions for Changes," Alex. R. Avery, of Port Huron. The newly elected officers for the ensuing year are: President, George P. Wanty, of Grand Rapids; Vice-President, Charles Flowers, of Detroit; Secretary, Ralph Stone, of Grand Rapids; Treasurer, Arthur Denison, of Grand Rapids.

During the business session Ex-Chief Justice Champlin took occasion to assail the JOURNAL in a manner entirely unwarranted. By his own admission in an explanatory letter since written to one of the editors, he based his caustic remarks upon an editorial comment relative to the standing of our State law reports, which appeared in the JOURNAL for June 1893. This editorial was written more than a year prior to the installation of the present Board of Editors, yet the Honorable Judge made the statement that the JOURNAL had recently published an editorial to the effect that the Michigan Supreme Court was deteriorating. This was misleading and unjust, for in his letter he confesses that not an editorial has appeared under the new editorial auspices to which he could take the slightest exception, and adds words of commendation respecting the marked improvement he has noted in the JOURNAL during the past few months. We hope, therefore, such denunciatory statements as were made relative to that unfortunate editorial which long ago should have been relegated to the domain of Ancient History, may not prove prejudicial to the JOURNAL'S interests, and that we may receive in the future from the members of the bar the same generous patronage and support we have enjoyed in the past.

HYGIENE AND THE JURY QUESTION.—What the money question is to politics and finance the jury question seems destined to become to the bar. A great portion of the time spent at bar associations meetings is consumed in discussions of plans by which the jury system may be improved. This topic was one of the principal ones discussed at the recent meeting of the Michigan State Bar Association. Various articles have from time to time been written upon it. Some have advocated a reduction in the number of jurors, while others have claimed that better results would be obtained if the verdict were not required to be unanimous. But in prescribing divers panaceas for supposed ills in the jury system, one phase of the subject seems to have been quite generally overlooked. That is the hygienic aspect of jury service. The article by Dr. Crothers in the current number of *The Popular Science Monthly*, entitled "A Medical Study of the Jury System", will therefore be of special interest to those who have given the matter study. We quote one pertinent paragraph from his article: "The diet of hotels, consisting of rich meats and desserts in great variety, is usually different from the average food of the average jurymen, particularly of the working class. The result is always overeating and under-exercise. This alone would quickly break up or disorder the mental activities. In addition to this, the confinement in the bad air of court rooms brings new sources of poisoning, particularly deficient oxidation, which of itself is sufficient to derange the normal brain functions. The crowded rooms at hotels are either overheated and badly ventilated or cold and noisy. The time for retiring and rising varies, and the usual habits of the juryman are changed in every respect. His accustomed food, sleep, and exercise, and his manner of thinking and the subject of his thoughts, all are broken up. He is asked to follow an intricate chain of reasoning, and discriminate the errors, and told that this is true and that is true, and that the law should lead him to some other point. He is flattered, and his pride is roused to do the best he can. He grows more incapacitated daily as the evidence accumulates and his system becomes deranged. Then, in despair, he will suddenly form some conclusion, guided by a fancy for some attorney or some remark by the judge."

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THE COMMON LAW OF THE UNITED STATES.—Aside from all discussion of the merits of the question it is a matter of regret that by several decisions of the State and Federal Courts and certain *dicta* of the United States Supreme Court the doctrine is becoming established that there is no United State common law separate and distinct from that of the States. The inconvenience, not to say failure of justice, which will result from this doctrine can easily be perceived by all. The evil results which would follow the elimination of the common law from our State jurisprudence are apparent, and there is no reason why the Federal courts should not be equally affected. The value of the common law as a part of our jurispru-

dence, even in the code States, cannot be overestimated. It has made possible the proud boast of our law that every wrong has its remedy, for when no statute or constitutional provision affords redress, the common law being founded upon the unchangeable principles of right and wrong and therefore capable of universal application, provides a remedy.

The latest case upon the subject is that of *Gatton* v. *Chicago, R. I. & P. Ry. Co.*, 63 N. W. 589, decided by the Supreme Court of Iowa. The court in an elaborate opinion in which all the authorities are reviewed, held "that the common law, as such, is not a part of the national jurisprudence." The court based its argument upon the fact that while the common law existed in this country prior to the Revolutionary War, it was merely the local law of each colony and had never been adopted or recognized as a part of the national jurisprudence. "Now, when, if at all, did this common law which had become the heritage of the colonists cease to be applicable to the colonies severally, or when did it take on its national character? Surely, not by the Act of Independence, which made the colonies "free and independent States." The mere fact of the emerging of the colonies from their colonial condition into that of independent States did not ingraft the common law, which had been severally adopted by the colonies, into a general system of national law. It is said that when they became independent they were governed by the common law of England, so far as they had tacitly adopted it as suited to their condition, by the statutes of England, amendatory of the common law, and by the colonial statutes. Judge Cooley says that the common law of England, and the statutes amendatory of it, "constituted the American common law, and by this, in great part, are rights adjudged and wrongs redressed in the American States to this day." *Cooley, Const. Lim. p. 37.* Here the learned author clearly recognizes that the common law he speaks of as being adopted in this country is the common law as adopted by the separate colonies, and not a common law of general national application. As is said in *Re Barry, 42 Fed. 127:* "Although the people brought with them, on their emigration to this country, the essential principles of the common law, and embodied them in their institutions, yet this was not done by them in a national capacity (at that time no such character or capacity was contemplated), but as distinct communities, independent of each other."

The court followed the case of *Swift* v. *Railroad Co., 58 Fed. 858,* and *64 Fed. 59*, where the precise question was decided in the same way. Other cases cited were: *U. S.* v. *Warrall, 2 Dall. 384; U. S.* v. *Hudson, 3 Cranch 32; U. S.* v. *Coolidge, 1 Wheat. 415; People* v. *Folsom, 5 Cal. 379; Garner* v. *Wright, 52 Ark. 385.* The only case in which it has been directly held that there is a federal common law is the case of *Murray* v. *Railroad Co., 62 Fed. 24.* It is to be hoped that the United States Supreme Court, which must finally settle the controversy, will decide, notwithstanding various of its *dicta* to the contrary, that there is a national common law.

# LEGAL MISCELLANY.

A common law of one of the United States, independent of any English common law on the subject, is recognized in *Commonwealth* v. *Lehigh Valley R. Co.* (*Pa.*) *27 L. R. A. 231*, which sustains the practice of rendering judgment by default on failure to appear, as one which has long existed in the State of Pennsylvania; and the practice is applied to the rendering of a judgment by default against a corporation indicted for misdemeanor, notwithstanding the lack of any precedents in criminal cases.

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The recent decision of the Supreme Court of Wisconsin in the case of *State* v. *Dukét* calls attention to a serious defect in the law of that State, which may be found to exist in other States. The constitution of that State provides that the legislature shall not grant any divorce. It was, nevertheless, held that a statute of that State, providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, is not in conflict with the constitution, and operates to absolutely dissolve the marriage when either party is sentenced for life. . . The court, in deciding the main question, says that the intent of the constitutional provision that the legislature shall not "grant any divorce" was not to restrict the legislature in the enactment of appropriate general laws, but the mischief sought to be suppressed was the granting of divorces by the legislature in special instances, by special laws—in view of the ease and facility with which such divorces might be procured, a power likely to be capriciously, improvidently and sometimes unjustly exercised.

The court was, however, compelled to go further and hold that the effect of the statute, as dissolving a marriage on the sentence of either party to life imprisonment, is not affected by the subsequent reversal of the sentence. This result is logical, sound and supported by authority. The reversal of the sentence cannot operate to restore the parties to their former matrimonial relations, as in the case of reversal of a valid judgment of divorce for mere error in its rendition. In States where sentence to imprisonment in the State prison for a term of years is made ground for an action of divorce, it has been held that as soon as the sentence has been given the right of the other party to apply for a divorce is complete (*Handy* v. *Handy*, *134 Mass. 394*), and that such right is not suspended by a bill of exceptions, on which the conviction and sentence may be

reversed (*Cone* v. *Cone*, *58 N. H. 152*). But the law should be amended so as to work a dissolution of the marital relation only upon the final affirmance of a sentence, or the expiration of the time to appeal. Indeed, this case will suggest forcibly the necessity for an amendment of the law so as to make a sentence of imprisonment ground merely for divorce. There is no reason why an innocent spouse should have her marriage dissolved if she prefers that the matrimonial *status* should continue.—*Central Law Journal.*

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A despositor who fails to notify a bank of the forgery of checks returned to him in his vouchers is held in *First Nat. Bank* v. *Allen* (*Ala.*) *27 L. R. A. 426*, to be estopped from holding the bank liable for subsequently paying similar forgeries. With this case is a note presenting all the decisions as to the duty of a depositor in respect to forged checks charged to him by the bank.

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A wife in giving an order to a domestic employed by a husband, to climb a ladder to a loft for pigeons, is said by Judge Sherwood in *Steinhauser* v. *Spraul* (*Mo.*) *27 L. R. A. 441*, to be, when considered as the implied agent of her husband, not liable for any injury resulting to the servant in making the attempt. This opinion presents an interesting discussion of this question of the maxim *Respondeat superior* as applied to the case of husband and wife. The case is not decided by the majority of the court on this question.

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The validity of the act of the legislature by which the Normal School site was located at Mt. Pleasant, is more than doubtful. The bill which passed the legislature on May 22, was not signed by the Governor until June 3, or three days after the final adjournment of the legislature. The constitution (art. IV., sec. 14) provides that "if any bill be not returned by the governor within ten days, Sundays excepted, after it has been presented to him, the same shall become a law in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not become a law. The governor may approve, sign and file in the office of the secretary of state, within five days after the adjournment of the legislature, any act passed during the last five days of the session; and the same shall become a law." Attorney-General Maynard in an opinion prepared upon the request of one of the members of the board of education contends that the act is clearly invalid as the terms of the constitution are explicit that the governor must approve each and every bill that has passed the legislature before its adjournment, except the bills passed within the last five days of the session. In the face of the plain provisions of the constitution it is diffiicult to see how any other conclusion can be reached.

In this era of electrical and cable cars the decision recently made in the case of *Thatcher* v. *Central Traction Co.* is of more than passing importance. It was held in that case that it does not constitute negligence *per se* for a man to drive along the left-hand track of a street railway which occupies a public street. The Court says: "If the gripman recklessly ran on at a high rate of speed, when the probable consequence was a collision, that was negligence for which defendant is answerable. As is held in *Ehrisman* v. *Railway Co.*, *150 Pa.*, *180:* 'It is not negligence *per se* for a citizen to be anywhere upon such tracks (railway on streets). So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car.' Or, as is said in *Gilmore* v. *Railroad Co.*, *153 Pa.*, *31*: 'Street railway companies have an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks.' In both these cases the court is speaking of the relative rights of the public and the railway companies on the streets of cities and boroughs where the grant is of the right to occupy the surface in common with the public. The construction of the track and the form of the rail are with a view to a user in common. The right of the wagon, in certain particulars, is subordinate to that of the railway. The street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way. Whether going in the same direction ahead of the car, or in an opposite one to meet it, the driver of the wagon must yield the track promptly on sight or notice of the approaching car. But he is not a trespasser because upon the track. He only becomes one if, after notice he negligently remains there."—*25 Pittsburgh L. Journal, N. S., 321.*

# RECENT MICHIGAN DECISIONS.

APPEAL IN GARNISHMENT—WHEN CERTIORARI WILL NOT LIE—Certiorari will not lie to review the finding of a justice in garnishment proceedings after an appeal taken to the Circuit Court by one having a right to appeal. *Lichtenberg* v. *Hosmer, Judge.* (July 2.)

AUTHORITY OF AGENT—A finding that defendant's traveling agent had authority to employ plaintiff as a salesman will not be disturbed, where it appeared that the agent had authority to establish an agency for the sale of defendant's wares, that the defendant ratified the agent's contracts for advertising, and in referring to his authority admitted that he had "some little leeway." *Booth* v. *Majestic Manfg. Co.* (June 4.)

CHANCERY PRACTICE—APPEAL FROM ORDER DISMISSING CONTEMPT PROCEEDINGS—Plaintiffs appealed from an order finding defendant not guilty of contempt for an alleged violation of an injunction restraining him from paying out certain moneys. *Held* that the order of the court below was final and conclusive and that no appeal would lie. *Rasch et al.* v. *Shepard.* (July 2.)

CONTRACT TO BUY LAND—ASSIGNMENT—FORFEITURE—Where the vendee in a contract for the sale of land, which provides for its forfeiture in case of default in payments, assigns his interest thereunder as collateral security, and the contract is subsequently declared forfeited by the vendor, any rights which the vendee has in the payments already made pass to his assignee. *Hooper* v. *Van Husen.* (June 4.)

CONTRACT WITH SHERIFF—INFORMATION AS TO OFFENSES—PUBLIC POLICY—EVIDENCE—PLEADING—1. In an action by a sheriff for services rendered in furnishing information leading to the apprehension of persons who had committed larceny from defendants in Wisconsin, one of whom had brought a portion of the stolen property into plaintiff's county, where he was arrested, the refusal to charge that plaintiff could not recover for information furnished touching offenses in his own county, or stolen property therein, notwithstanding defendants had promised to pay him for such information, and the failure to instruct that the bringing of stolen property into such county was an offense therein, was reversible error. 2. A party may testify as to the value of services rendered by him when he has stated that he is acquainted with the value of services of that character. 3. In an action to recover the reasonable value of service rendered in giving information leading to the arrest of criminals, it is not competent for plaintiff to base his judgment as to the value of his services on the fact that specific rewards may have been offered in cases more or less similar. *Foley* v. *Platt et al.* (June 4.)

CRIMINAL LAW—DEFECTIVE INFORMATION—MOTION IN ARREST OF JUDGMENT—Where an information is faulty in not setting forth the offense designed by the statute, it is erronous for the court to refuse to grant a motion in arrest of judgment after conviction. Inasmuch as the question raised was one open to review by the court before the enactment of the statute relative to review of motions for new trial, the action of the lower court in refusing such motion is open to review. Where the information fails to set forth the offense defined by the statute, an amendment cannot be had. *People* v. *Rathbun*, (Grant, J, dissenting, July 2.)

EASEMENT BY PRESCRIPTION—EVIDENCE—INJUNCTION—TO DETERMINE TITLE TO LAND—1. One whose lands abut on a strip acquired by a railroad company as its right of way has no rights over such strip, though it was used for passage to the lands for over 30 years, where the railway company actually and continuously occupied it, and maintained notices that the property was private. 2. An in-

junction will not be granted to enjoin defendant from moving a fence to a line claimed by it as the boundary from a line claimed by plaintiff as the boundary, where the title to the intervening land has never been adjudicated at law. *Andries* v. *Detroit, G. H. & M. Ry. Co.* (June 4.)

ELECTION LAW—APPLICATION FOR RECOUNT—Under the statute an application for a recount of votes must be had on or before the last day of the session of the board of canvassers and one desiring a recount cannot by filing a protest, which the law does not recognize, extend the time within which such application can be made. *Brennan* v. *Common Council.* (July 2).

EXEMPTION—HOW EFFECTED BY ABANDONMENT OF BUSINESS—The right of exemption of his stock in trade, is vested solely in the husband and a voluntary abandonment by him of his business, will work a forfeiture of such right of exemption. *Bets* v. *Brenner.* (July 2).

INSURANCE LAW—CHANGE OF BENEFICIARY BY WILL—Deceased having been divorced from his wife, made application to her for the return of a certificate of insurance in order to change the beneficiary, which was refused. Whereupon he applied to the lodge which issued the certificate to make the desired change, setting forth his failure to secure the certificate from his wife, and upon its refusal to do so, disposed of the fund in his last will. *Held:* It appearing deceased handed the certificate to his wife for safe keeping only and not with an intent to part with his right to change the beneficiary, the testamentary disposition of the fund should prevail. *Grand Lodge A. O. U. W.* v. *Kohler.* (July 2).

INSURANCE LAW—PAYMENT OF FUND INTO COURT—A policy of insurance was made payable to a daughter of the insured, if surviving, or in the event of her prior death, to the legal representatives or assigns of the insured. Held: That the company, having conceded its liability on the contract by paying the amount into court, the question of whether or not the policy is a wager policy, is no longer open for determination and the only contingency by which the heirs could under the terms of the policy become interested in the policy not having happened, the amount should be paid to the beneficiary named therein. *Standard Life & Acc. Ins. Co.* v. *Catlin et al.* (July 2).

JOINDER AS DEFENDANTS OF PRINCIPALS AND SURETIES ON A BOND—In a civil action under section 2,283, c. 3, 3 How. Stat., the principals and sureties on several bonds may be joined in one action. *Franklin* v. *Fay et al.* (July 2).

MORTGAGES—PAYMENT TO ALLEGED AGENT—Complainants gave a mortgage to defendant to secure a note, both instruments being forwarded to an agent of the mortgagee, who retained the same, and, from time to time, as the interest came due, forwarded the coupons to M., who collected the interest thereon. Subsequently the principal and balance of interest was paid to M. upon his agreement to send for and get a discharge of the mortgage, but instead of so doing he used the money in his own business, and the mortgage was never discharged, *Held,* that the payment of interest to M. did not make it the agent of the mortgagee for the collection of the principal, and afforded the mortgagor no defense to an action of foreclosure. *Trowbridge et al.* v. *Ross.* (June 4.)

MUNICIPAL LAW—FAILURE TO COVER GUTTERS—In paving a street a sluiceway was left between the edge of the crosswalk and the pavement some twelve inches wide and seven inches deep, with vertical sides, which were covered by planks supported by iron straps. *Held:* That it being shown that there were a number of these gutters upon the streets the covers to which were frequently taken off for various causes and not replaced, such cross-walks cannot be considered as reasonably safe for travel. *Schrader* v. *City of Port Huron.* (July 2).

## *CURRENT LITERATURE.*

The *Atlantic Monthly* for July contains the first of Dr. John Fiske's promised historical papers. The subject treated in this issue is "The Elizabethan Sea Kings." Such picturesque historical characters as Raleigh, Drake, and others of their time become doubly attractive when described by so charming a writer as Mr. Fiske. Another Series which promises delightful reading describes "An Architect's Vacation." Mr. Robert S. Peabody, the well-known Boston architect, is the author, and the first paper treats of Rural England.

The *Review of Reviews* is still pursuing its laudable plan for making Australian politics more intelligible to the American public. In the July number Mr. J. Tighe Ryan has an interesting article on "The Political Leaders of New South Wales." Of these leaders, Sir. Henry Parkes, at the ripe age of eighty, is the most picturesque figure; then comes the new Premier, M. G. H. Reid, with his associates in the government, who are rapidly sketched in the order of political prominence. The sum of impressions furnished by a reading of Mr. Ryan's article is that in the matter of statesmanship New South Wales is not yet reduced to the poverty-stricken condition of the United States Senate.

The July *American Magazine of Civics* contains an excellent article by Mary J. Eastman entitled: "The Woman Question: Retrogressive Pathways." Other articles of interest are: "The Distress of Nations," by James M. Beck; "A Plea for the Gold Standard," by Wilmot H. Goodale; "The Progress of Municipal Reform, 1894-5," by Clinton R. Woodruff; "National Political Parties, Past, Present, and Future," by Walter H. Brown.

This is the time of the year when *Public Opinion* is most valuable. So many things occur to occupy the public mind that for a busy man to keep up with the times this sprightly journal is almost an absolute necessity.

Two refreshing articles for "summer reading" are Fenimore Cooper's Literary Offences," by Mark Twain, and "Coin's Financial School and its Censors," by W. H. Harvey, contained in the July *North American Review*. Other interesting articles in that number are: "How Free Silaer Would Affect us," by the Hon. E. O. Leech; "The Disposal of a City's Waste," by Col. Geo. E. Waring, Jr., and "The Need of Better Roads," by Martin Dodge.

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## *THE CONSTITUTION OF THE EMPIRE OF JAPAN.*

TORAZO KIKUCHI.

In the following article on the Constitution of the Empire of Japan, I have borrowed the divisions and methods of procedure followed in "The Commentaries on the Constitution of the Empire of Japan," written by Count Hirobumi Ito, President of the Privy Council at the time the Constitution was drawn, and at present Prime Minister of the Empire.

The Constitution was proclaimed by His Majesty the Emperor at Tokio on the 11th day of February, 1889, in the presence of the Imperial Family, the nobility, the most important civil and military dignitaries, and representatives from each State of the Empire.

The new Constitution produced a most radical change in every department of the governmental system,—the executive, legislative and judicial. Japan was an absolute monarchy for over twenty-five centuries, but the beginning of a constitution can be dated as far back as the seventh century, when Prince Shotoku established a law containing articles with many of the characteristics of a constitution. It established definitely the mutual relations of the Imperial Family, the nobility, and the common people. This law held force over all Japan for several centuries, or until the Feudal government was established. Beyond this law the history of Japan shows nothing until the present era.

I will quote the Preamble of the Constitution and the speech delivered by His Majesty the Emperor at the promulgation.

### PREAMBLE.*

"Having, by virtue of the glories of Our Ancestors, ascended the throne of a lineal succession unbroken for ages eternal; desiring

*Preamble and Imperial Speech were translated by Mr. M. Ito, private secretary of Prime Minister Ito.

to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meji* a fundamental law of State, to exhibit the principle, by which we are to be guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

"The rights of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

"We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meji, and the time of its opening shall be the date, when the present Constitution comes into force.

'When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative rights, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our Descendants or Our subjects be permitted to attempt any alteration thereof.

"Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution."

## THE IMPERIAL SPEECH.

Whereas we make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power, We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our presents and their descendants.

"The Imperial Founder of Our house and Our other Imperial

*The 23d year of Meji corresponds to the Christian year 1890.

Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavors, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, aud of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors."

Although these are ceremonial descriptions, they are enough to explain how the Constitution was formed and also its character. If we look at the history of the great western nations, we find that they have attained the blessings of constitutional governments only through bloody wars or fierce revolutions; often followed by a despotism more severe than that which formerly existed, which in its turn has been overthrown in another spasm of popular fury and indignation. Japan has been more fortunate than her western sisters; her constitution was the simple and peaceful fruit of twenty years unparallelled advance in sociological, economical, educational and political conditions; it was confidently demanded by the people, cheerfully granted by His Majesty the Emperor, and both have felt increased love and respect for the other since its well omened establishment.

I will give a short historical sketch describing the sovereign rights of the Emperor and the relations between him and his subjects. It is a very important subject because the relations existing for nearly thirty centuries were entirely changed by the new Constitution.

Japan has been an absolute monarchy ever since the first Imperial Ancestor Jimmu succeeded to the throne 2555 years ago, and the Emperors have since had absolute power over the land and the people. In the Middle Ages, however, the sovereign power was transferred to the family of Fujiwara—closely related to the Imperial Family—and afterward to the great generals, when the feudal government was established. During this time, although the supreme power was practically in the hands of the Fujiwara family or the great generals everything was done in the name of the Em-

peror. As a result of this strange system there were two central governments—one was Imperial, the other Feudal—until twenty-eight years ago, when the great general Togugawa lost his supreme power, and the Emperor again became all powerful. At that time the people were wretched. They had no right to criticise the governmental policy, the system of taxation or even the cruel methods of punishments. The common people were obedient to the nobility and the wealthy and influential families who constituted the military class. They were obliged to pay excessive taxes, and to obey the severest commands without complaint. Especially, while the Togugawa government was supreme, the lives and property of the common people were entirely in the power of the military class. However, these wretched conditions were not conducive to the advance of civilization, and in 1868 the Feudal government was overthrown and the Imperial power has since grown strong and vigorous. At the same time, the Emperor has been forced to issue decrees proclaiming as his policy the desire of a constitutional form of government. The Emperor declared his hope that the Constitution would state precisely the rights and duties of his subjects, and gradually promote their welfare by securing unity of the sovereign powers in the head of the State, and by opening a wider field for business activity.

The Constitution of the Empire of Japan consists of seven chapters and seventy-six articles.

The chapters are classified as follows:—

I. The Emperor.
II. Rights and Duties of Subjects.
III. The Imperial Diet.
IV. The Ministers of State and Privy Council.
V. The Judicature.
VI. The Finances.
VII. Supplementary Rules.

## THE EMPEROR.

The first chapter is the most important one. It refers to the Imperial power to reign over and govern the State, and reference also is made to the original national policy.

Article I. provides that: "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." This article clearly states the relation existing between the Emperor and his subjects. With reference to this article, Count

Ito said in his Commentaries: "This article declares that the Empire of Japan shall, to the end of time, indentify itself with the Imperial dynasty unbroken in lineage, and that the principle has never changed in the past, and will never change in the future, even to all eternity." Indeed, the sacred throne of Japan is inherited from the first Imperial Ancestor Jimmu who succeeded to the throne 660 B. C., and although the country has often been changed in its governmental conditions, nevertheless the splendor of the throne has been transmitted through an unbroken line from that date to the present time. The Emperor is held to be descended from heaven and although he has to pay due respect to the law, yet the law has no power to hold him accountable to it, as article III. decrees that: "The Emperor is sacred and inviolable."

Of the sovereign power of the Emperor article IV. provides: "The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provision of the present Constitution." But he has no actual power in legislation except by the consent of the Imperial Diet. (Art. V.) The power of sanctioning a law, causing the same to be promulgated in a proper form, and ordering the execution of it belongs to the sovereignty of the Emperor. (Art. IV.) He also has power to veto any proposed law. The veto power is negative as in England, and is a part of the legislative power of the sovereign. The Emperor has actual power to issue Imperial Ordinances as administrative ordinances in consequence of an urgent necessity to maintain public safety or public peace and order. But no Ordinance can alter any of the existing laws. (Art. VIII. & IX.) The second clause of article VIII. also adds: "Such Imperial Ordinances are to be laid before the Imperial Diet at its next session and when the Diet does not approve the said ordinances, the Government shall declare them to be invalid for the future." This clause is the most ambiguous one of all the provisions of the Constitution. According to the Commentaries of Count Ito it is divided into seven heads:

I. The Imperial Ordinances take the place of a law in consequence of the Diet not sitting, by virtue of the Constitution.

II. When the Diet gives its approbation to an Ordinance, it shall possess the power of law for the future.

III. When the Diet does not give its approbation, it will lose the power of law.

IV. The Diet can refuse its approbation on the ground that it conflicts with the Constitution or for some other legislative consid-

eration.

V. If the government does not submit the ordinance to the Diet at its next session, or, if after the Diet has refused to give its approbation to it, the government still enforces the Ordinance, then the government shall have to bear the responsibility of a breach of the Constitution.

VI. The refusal of approbation by the Diet is consequently to be regarded simply as its refusal to approve of the future continued enforcement of the Ordinance as law, but such refusal can not reach the past.

VII. The Diet has no power to amend such an Ordinance.

Beside these provisions stated above this chapter treats of the sovereign power in regard to the organization of the branches of the administration; salaries of all civil and military officers and their appointment and dismissal; the declaration of war, peace and treaties; declaration of a state of siege; the conferring titles of nobility, rank. order and ordering amnesties, pardon, commutation of punishment and rehabilitation. (Art. X, XIII, XIV, XV, and XVI).

The supreme command of the army and navy; and determining of the organization and peace standing of the army and navy, also belong to the sovereign power of the Emperor. (Art. XII and XIII). In these provisions there is scarcely any difference from those of England and Germany.

*Rights and Duties of Subjects.* This is the most important chapter to the Japanese people. Since the Middle Ages, when the Feudal government was established, the military and common people were placed in different classes as stated above. The former monopolized the exercise of all public rights, while the latter were not only excluded from the enjoyment of these, but were also curtailed in the full enjoyment of their civil rights. Although, when the Imperial government was re-established in 1866, the power of the nobility was reduced and the people recovered their full liberty, still there was no legal provision which guaranteed liberty to the people until the present Constitution was declared.

In this chapter we find the two important articles to be articles XIX. and XXVIII. Article XIX. provides that: "Japanese subjects may, according to qualifications determined by laws or ordinances, be appointed to civil or military or any other public offices equally." As previously stated, since the Middle Ages there has been no opportunity for the common people to be appointed to any

public office although we had no such law: in fact the common people were excluded by the higher classes. However, at the present time, according to this chapter appointment to a civil, military or to any other public function is not regulated by the consideration of family. Indeed, this is regarded as one of "the splendid results of the Restoration."

Article XXVIII says that: "Japanese subjects shall within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief." The freedom of religious belief, is justly regarded as one of the most beautiful fruits modern civilization. In Japan, just as in European countries, there was frequently bloodshed in the struggles of religious factions. The national religion of Japan has been Shintoism ever since the existence of the country; the Buddist religion was recognized in the country, about twenty centuries ago after several struggles. The Christian religion was introduced into the country over five hundred years ago and for some time it was allowed there, but at the beginning of the sixteenth century its exercise was forbidden in the country in accordance with the policy of the Togugawa government. When that government was overthrown, prohibition of the Christian religion was removed, but there still was no lawful recognition of the religion until the present Constitution decreed it. Under this article great progress has been made in securing the individual right of free thought and speech and full liberty has been obtained in the choice of religious belief, with a few exceptions. For example, Mormonism is not tolerated, as bigamy is considered a heinous crime in the criminal law of Japan.

This chapter also treats of the rights and duties of service in the army and navy; the paying of taxes; liberty of abode, liberty from unlawful arrest, of trial and punishment; secrecy of private letters; the right of property, and liberty of speech, writing, publication, public meetings and associations. (Art. XX, XXI, XXII, XXIII, XXVI, XXII, and XXIX). These articles are not sufficiently important to merit consideration here.

*The Imperial Diet.* In this chapter are mentioned the essential features of the Constitution and rights of the Imperial Diet. It is entirely a new system in Japan, and one which was borrowed from western civilization and is the fundamental basis which has changed the governmental system from the absolute to the constitutional monarchy. According to the theory of political philosophy, the system of diet is divided into two different kinds; viz.: (a) Uni-

cameral, or one legislative assembly; and (b) Bicameral, or two assemblies. The unicameral system is regarded by many as one of the best systems by which to represent the people directly. However, as yet, we have observed no republican country to have adopted this system—the United States and France have the bicameral system—and at the present time, the bicameral is rather considered as the best by both republican and monarchical countries. The Japanese Constitution is also founded upon the latter system. Article XXXIII provides that: "The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives. The house of Peers shall be an assembly of the higher class of the community, while to the House of Representatives commoners shall be elected. These two houses united together shall constitute the Imperial Diet which represents the public opinion of the country and they have equal power with each other." I will refer to the Laws of the House of Peers and the House of Representatives to give a fair understanding of the construction of both Houses. By the Law of the House of Peers, the members of the House consist of five different classes.

I. The male members of the Imperial Family.

II. Princes and Marquises who have attained the age of twenty-five years.

III. Counts, Viscounts and Barons who have been elected thereto by the members of their respective orders.

IV. Persons who have been specially nominated by the Emperor, on account of meritorious services to the State or on condition.

V. Persons who have been elected, one member for each city and prefecture, by and from among the taxpayers of the highest amount of direct national tax on land, industry, or trade, or who have afterwards been nominated thereto by the Emperor. (Law of the House of Peers, Art. I and II) The term of office is seven years. (Art. VII) The President and Vice-President are nominated by the Emperor, from among the members, for seven years also. (Art. XI.)

By the Law of the House of Representatives, members to be elected require the following qualifications:

I. They must be male subjects of 30 years of age or over.

II. In the district in which they desire to be elected they shall have paid a direct national tax of more than 15 yens*, for a period of not less than a year, previous to the date of the making out of the

*A yen is equivalent to one dollar.

electoral list and they must show that they are still paying that amount of direct national taxes. (Law of the House of Representatives, Art. VIII).

The qualifications of the elector are:

I. Japanese male subjects of more than 25 years of age.

II. One who has his permanent residence and has actually resided in the district for over one year previous to the date of the making up of the electoral list.

III. For more than one year previous to the date of the making out of the electoral list, he must have been paying direct national taxes to the amount of more than 15 yens and must be still paying the same.

According to the same law, at the present time, the electoral districts are divided into 247; and the total membership of the House is 300 in the proportion of one member to each 150,000. The term of office is four years. The Diet is convoked every year and the session lasts three months. When urgent necessity arises, an extra session may be convoked by an Imperial Ordinance. (Art. XLI, XLII, and XLIII).

Beside these, this chapter treats of all the rights and duties of the Imperial Diet. Among these there are four most important provisions, viz:

I. The right to receive petitions.

II. The right to address the Emperor and to make petition to him.

III. The right to put questions to the government and demand explanations.

IV. The right to control the management of the finances.

The Diet is thus true to its function as a good representative body of the people.

*The Ministers of State and the Privy Council.* This chapter consists of two articles only. Article LV provides that: "The respective Ministers of State shall give their advice to the Emperor, and be responsible for it. All laws, Imperial Ordinances and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State." Article LVI says that: "The Privy Councellors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor." Of these articles we consider that the Ministers of State are charged with the duty of giving advice to the Emperor; and

they are to execute administrative affairs. Every Minister of State shall take part in the deliberations of the Cabinet and shall have charge of the affairs of some one department of State and shall have to bear equal responsibility in the affairs of State, because the right of sovereignty must be exercised with the assistance of the machinery provided for public representation and with that of the Ministers of State. Thus in our Constitution, the following conclusions have been arrived at: 1, That the Ministers of State are charged with the duty of giving advice to the Emperor, which is their proper function, and that they are not held responsible on His behalf; 2, That Ministers are directly responsible to the Emperor and indirectly so to the people; 3, That it is the sovereign and not the people that can decide as to the responsibility of Ministers, because the sovereign possesses the rights of sovereignty of the State; 4, That the responsibility of Ministers is a political one and has no relation to criminal or civil responsibility, nor can it conflict therewith, neither can the one affect the other.

At present, the Cabinet of the Japanese Government is composed of ten Ministers:

I. The President of the State.
II. The Minister of Foreign Affairs.
III. " " " Home Affairs.
IV. " " " Finance.
T. " " " War.
VI. " " " the Navy.
VII. " " " Justice.
VIII. " " " Education.
IX. " " " Agriculture and Commerce.
X. " " " Communication.

The Privy Councillors are required to give their opinions concerning important matters of State in response to the Emperor's call therefor. Their duty is to be perfectly loyal and straightforward in furnishing advice to the Emperor, as they are the highest body of the Emperor's constitutional advisers.

*The Judicature.* In ancient time this power was not distinct from the executive power and these two functions being united in one body, tended to a most deplorable state of affairs. In 1871, when the Tokio Court of Law was established, the judicial power was nominally separated, but there was no lawful action taken, and it was practically ignored until to the date of the declaration of the present Constitution.

Article LVII of the Constitution provides that: "The Judicature shall be exercised by the Courts of Law according to law in the name of the Emperor. The organization of the Courts of Law shall be determined by law." From this article we see that the Judicature is combined in the sovereign power of the Emperor as part of His executive power, hence all judgement are pronounced in His name; the judicial authority in this respect representing Him in His sovereign power.

Of the independence of judges, article LVIII says: "No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment." Count Ito gives a clear elucidation of this article as follows: "In order to remain impartial and fair in trials, the judges ought to occupy an independent position free from the interference of power, and should never be influenced by the interest of the mighty or by the heat of political controversies. Accordingly they are entitled to hold office for life, unless dismissed from service by a criminal sentence or by the effect of a disciplinary trial." This is the foundation of the independence of the judicial power of Japan. This chapter also treats of the Court of Administrative Litigation, but the subject does not seem to require explanation here.

*Finance.* Finance forms an important part of the administration, as it relates to the management of the annual expenditures and revenues of the State, and has a close and intimate bearing upon the resources of the people. Indeed, one of the most beneficent features of the Constitution is that it clearly defines the extent of the rights of the Imperial Diet to control taxation. It is said that at the time of old Japan, the power of taxation belonged absolutely to the government and that the subjects had no voice concerning the question but had to pay as much as the government demanded. This system has been entirely changed by the present Constitution. Article LXII provides that: "The imposition of a new tax or the modification of the rates, (of an existing one) shall be determined by law." However, all administrative fees or revenues having the nature of compensation which are in their nature different from taxes, such as governmental railroad fares, public school fees and the like, shall not be determined by law.

The first clause of article LXIV is: "The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual budget." Regarding the rights of priority of the budget articte LXV provides: "The budget shall be first laid before the

House of Representatives." The rules and regulations of the budget here being similar to those of England and the United States. When the Diet has adjourned before it has acted upon the budget, or when the budget has been rejected by one of the Houses, the government shall carry out the budget of the preceding year, because it will have no existence until the next session of the Diet. (Art. LXXI). A reserve fund to supply deficiencies in the budget, which are unavoidable, and to meet requirements unprovided for in the same is provided in the budget. (Art. LXIX).

The Diet has primary control of all financial operations, and as a result it has also a subsequent control of verifying the statement of accounts of the past budget. The government must present before the Diet the final accounts that have already undergone verification by the Board of Auditors, together with the report thereon of the Board. The organization of the Board of Auditors is provided by a different law and its functions are entirely independent of those of the government.

*Supplementary Rules.* This is the last chapter of the Constitution, and consists of four articles. These articles treat of the powers of the sovereign and of the Diet to amend the Constitution. As I stated above, the Constitution has been personally declared by His Majesty the Emperor, therefore the Emperor and the Imperial descendants have actual power over it. With the development of society all laws advance and so the Constitution, although it is a fundamental law, may at some time in the future have to be amended. Article LXXIII says: "When it may in future become necessary to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial order." The question has been raised why, if the power of amendment is vested in the Emperor, is the matter to be submitted to the Diet at all? Considering this question the Count says in his Commentaries: "The Emperor's great desire is that a great law, when once established, shall be obeyed by the Imperial Family as well as by his subjects and that it shall not be changed by the arbitrary will of the Imperial Family." According to the same article the houses cannot open their debates without the presence of more than two-thirds of the members, and no amendment to the Constitution can pass either House without the affirmative vote of two-thirds of the members present. This provision shows that great caution is to be exercised in regard to matters relating to the Constitution

# SOME RESULTS OF THE DARTMOUTH COLLEGE CASE.

GEORGE P. WANTY.

"No state shall pass any law impairing the obligation of contract" (Sec. 10 Art. III, Constitution) is a provision of the National Constitution that provoked very little discussion in the convention. Its only purpose was to preclude the repudiation of debts and it is referred to with but a passing remark in the Federalist. That so important a sentence in the constitution which has been before the courts more often than any other and upon which has been built more constitutional law than upon any other provision contained in that instrument, should not have received more attention in and out of the convention is one of the many evidences of our indebtedness to John Marshall and his successors for more of our fundamental law than to those who supposed they framed it.

In 1769 the British Crown granted a charter to the trustees of Dartmouth College in New Hampshire. This charter conferred upon the corporation the entire governing power of the college; and, among other powers, that of filling up all vacancies occurring in their own body and of removing and appointing tutors. It also declared that the number of trustees should forever consist of twelve and no more. After the Revolution, the legislature of New Hampshire passed a law to amend the charter, to improve and enlarge the corporation. It increased the number of trustees to twenty-one and gave the appointment of the additional members to the executive of the state and created a board of overseers to consist of twenty-five of whom twenty-one were also to be appointed by the Governor of New Hampshire. There grew out of the attempt of the legislature to thus control the college a fierce political contest, the federatists on one side championed by Smith and Webster, holding that such interference was beyond the legitimate scope of legislative power, and the anti-federalists on the other contending that the college was formed for the public good and the right to amend and improve charters of a similar nature had been exercised by all governments, both monarchial and republican and was a legitimate exercise of the inherent right of the people. The message of Gover-

nor Plummer to the legislature embodying the argument of the anti-federalists was sent to Jefferson, who replied July 21st, 1816: "It is replete with sound principles and truly republican. Some articles too, are worthy of notice. The idea that institutions established for the use of the nation can not be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may perhaps be a salutory provision against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceeding generations held the earth more freely that we do; had a right to impose laws on us, unalterable by ourselves, and that we, in like manner, can make laws and impose burdens on future generations which they will have no right to alter; in fine, that the earth belongs to the dead and not to the living." The Supreme Court of the United States in the case, some of the results of which I am to relate, in 1819, in reversing the decision of the Supreme Court of New Hampshire, which had declared the acts of the legislature valid, decided, in an opinion of much greater length than this paper, that the original charter constituted a contract between the Crown and the trustees of the college which was not dissolved by the Revolution and that an act of the State Legislature of New Hampshire, altering the charter, without the consent of the corporation, violated the clause of the constitution I have quoted and was therefore void. This case, in effect, held that the charters of private corporations are contracts between the legislature and the corporations, having for their consideration the liabilities and duties which the corporations assume by accepting them; and the grant of the franchise can no more be resumed by the legislature or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself. This decision was hailed by the federalists as a great blow to Jefferson's theory of strict construction and Chancellor Kent, several years later, admiringly wrote: "It contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of goverment and to give solidity and invincability to the literary, charitable, religious and commercial institutions of our country." This impregnable barrier was at once appreciated by the corporations then in existence and stimulated from that time the formation of private corporations, to which alone

the protection was in terms limited, for every conceivable object.

The charters of these private corporations were soon, in a multitude of cases, held to be inviolable contracts between the legislature and the corporators, and their grants were held to vest absolute titles, their franchises were property irrevocable, and not subject to legislative control. One of the results of this judgment can be found in the great encrease in the number of private corporations and development of the natural resources of the country by them. They built our canals, railroads and ships; mined our gold, silver, copper and coal; manufactured our cloth, machinery and books; built our hospitals, schools and churches; colonized and settled our public domain; and were most powerful agencies in the development and prosperity of the nation. We owe to them and to the great stimulating effect of the Dartmouth College case a debt which all are ready to acknowledge.

The corporations which have so wonderfully contributed to our prosperity were, of course, actuated by selfish motives, and taking advantage of the doctrine of this case, built up by a mass of succeeding decisions, and the desire of legislatures and the people to encourage their efforts, applied for and received grants of the public funds, the public land, monopolies in every kind business, exemption from taxation and have become so powerful as, in the minds of some learned commentators, to threaten the very existence of the government itself.

The doctrine that every right or privilege coaxed, cheated or purchased from a legislature is inviolable for all time, has, from the day it was promulgated by Marshall and Story, met with the most strenuous and learned opposition. It has, however, continually received judicial sanction and brought about the law-making and franchise-giving power of the state, a horde of wealthy and unscrupulous persons whose influence for evil is more far reaching than most of us imagine.

When it was considered settled that a valuable franchise is property and cannot, by a subsequent legislative body, be taken away or modified without the consent of the grantee, it opened up the most profitable line of business which has been carried on in this country. The history of the organization of great corporations whose most valuable property consisted of the privileges granted by the people's representatives without consideration to those whom they were selected to represent, is the most scandalous and shameful chapter we have made. Its influence has permeated every legislature in this country.

The value of the special charters which have been granted

without renumeration would many times pay the national debt. The governments which have granted them seem to have had no care or thought for the future generation and we find cities tied hand and foot by grants given in their infant days which preclude all interference by the subsequent lawmakers. The examples are so numerous that they come to your minds without stating them. The exclusive privileges of laying water pipes, gas pipes and railroad track in the streets are most familiar, and have been sources of great wealth to many who have been so sagacious and thrifty as to secure them. The early privileges were granted without specifying the charges to be made for the services to be rendered and the public have paid whatever the conscience of the corporations have allowed them to exact. When the charges have become unbearable the courts have been, until within a few years, sought in vain for relief, the corporations successfully contending that they were entitled to their own property with "its use and the fruits of that use" under the authority of the Dartmouth College case.

Powerful railroad and other corporations have received charters exempting their property from taxation and, on the authority of the Dartmouth College case, the charters granting these exemptions have been held to be contracts which no subsequent legislature can impair. *New Jersey* v. *Wilson*, *7 Cranch*, *164* (*Marshall*). *Followed in Gordon* v. *Appeal Tax Court*, *3 Howard 133; Piqua Bank* v. *Knopp 16 Howard*, *369; Ohio Life and Trust Co.* v. *Debolt*, *16 Howard*, *416*; *Dodge* v. *Woolsey*, *18 Howard*, *331; Mechanics and Traders Bank* v. *Thomas*, *18 Howard*, *384; Mechanics & Traders Bank* v. *Debolt*, *18 Howard*, *380; McGee* v. *Mathias*, *4 Wallace*, *143; Home of the Friendless* v. *Rouse*, *8 Wallace*, *430; Washington University* v. *Rouse*, *8 Wallace*, *439*; *Mobile & Ohio R. R. Co.*, v. *Tennessee*, *153 U. S. 486.*

These decisions hold, in effect, that the scope given to the clause of the constitution prohibiting the state from passing any law impairing the obligation of contracts, by the great Chief Justice, allows a legislature, induced by no matter what cause, to give away forever the taxing power of the state, which means to end its existence.

The means taken to secure these inviolable privileges have been a source of danger to the people and are perhaps the most deplorable results of the great judgment. That property so valuable, in the hands frequently of irresponsible persons, should be sought for by the thrifty is not surprising. When the passing of a law by a

state legislature will exempt the property of a few from taxation for all time, we can scarcely imagine persons so modest that they would make the request and use what influence they deemed legitimate to secure a compliance. When for the asking or the influence required a few persons may secure a franchise for a railroad or other enterprise, which, before a stroke of work is done, is worth many millions of dollars, and the urgency with which the request is presented and pressed is but natural. This power of the legislature has brought to its doors what is called the lobby or third house. The organization of this lobby in many of the states is more systematic than the house itself, and contains men who are in the pay of wealthy and powerful corporations who have had more to do with the nomination and election of the members than the organized political committees which were brought into existence for that purpose. This influence is great and many persons are so dull that they cannot see the difference between paying the nomination and election expenses of a member in advance and paying them after the election when a vote for some measure is wanted, and in fact we are told that this little distinction is entirely lost sight of, and the profits derived from the legislature to these corparations is often divided with the members of that body. When it is understood in the community as it is fast getting to be, that the National Legislature can be controlled by the sugar trust, that the State Legislatures can be controlled by the railroad companies, the Common Councils of our cities by the street car, water and gas corporations and the Boards of Education by the corporations which publish our text books, the permanence of our institutions is indeed threatened. When the belief gets to be deep seated that our laws are bought, as many now think can be demonstrated, these laws will command no respect and will be registered if necessary by force. The fearful state to which we have been brought by these powerful corporations makes us sometimes question upon which side is found the balance. We owe to them much of our prosperity, as stated in the opening of this paper, we owe to them much of our shameful degeneracy which has just been recited. We would not wish to dispense with their all powerful influence in developing our resources and civilization but we cannot survive if they are allowed to continue to corrupt the fountain-head of our laws in which the people have been taught to place implicit confidence.

But the doctrine of the Dartmouth College case has not gone through these years unassailed. It has met with the most strenuous

opposition from the profession, the people and the bench, until some of its tenents have been distinguished out of sight and others obviated by constitutional enactment.

So long as John Marshall dominated the federal bench the course was straight and the doctrine in its entirety preserved, but at the first term after his death the opposition set in and from that time to the present, every effort has been made to bring about an abandonment of its most obnoxious features.

In the Charles River Bridge Case (*11 Peters, 420*) (*1837*), Chief Justice Taney gave a great shock to the doctrine laid down by Marshall and held that a grant to a corporation must be so strictly construed that if it did not by express terms preclude the legislature from granting a franchise to another corporation, whose competition would injure or destroy the value of the first grant, a law, granting such franchise, was constitutional, notwithstanding the fact that its effect was to entirely destroy the value of the first franchise. Webster argued this case as he had the Dartmouth College case before Marshall and on exactly the same reasoning he expected a judgment. Before the case was decided Marshall died and Taney took his place. The decision took half the sting from the doctrine and called forth the anathemas of Webster and Story and Kent. Webster wrote: "The decision of the court will have completely overturned, in my judgment, one great provision of the Constitution." Kent, writing of the same case, says: "It abandons or overthrows a great principal of constitutional morality, it injures the moral sense of the community, and destroys the sanctity of contracts," and Judge Story must have been feeling pretty badly when he wrote to Justice McLean, "There will not, I fear, ever in our day be any case in which a law of a State or of Congress, will be declared unconstitutional, for the old constitutional doctrines are fast fading away."

Whether Taney had a clearer perception of the results of the doctrines of the Dartmouth College case than had Marshall or whether, as many believe, he seized the first opportunity to declare for strict construction and weaken the power of the federal courts over the states, I do not know, but for the departure he made in this case he is entitled, I think, to as much praise as has been given to Webster, Story and Marshall for the decision it was supposed to in part overrule. The doctrine that these franchises were their property, and the corporations which owned them were entitled to "their use and the fruits of that use" received a great set back in the "Warehouse", "Granger", and "Railroad Commission" cases,

*Munn* v. *Illinois*, *94 U. S. 113*; *C. B. Q. R. R.* v. *Iowa*, *94 U. S. 155*; *Peik* v. *C. & N. W. R. R.*, *94 U. S. 164*; *C. M. & St. P. R. R.* v. *Ackley*, *94 U. S.*, *179*; *Winona & St. Peter R. R.* v. *Blake*, *94 U. S. 180*; *Stone* v. *Wisconsin*, *94 U. S.*, *181*; *Ruggles* v. *Illinois*, *108 U. S. 526*; *Railroad Commission Cases*, *116 U. S.* beginning at page 307.

These cases held that "where private property is devoted to a public use it is subject to public regulation" and that "property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw the grant by discontinuing the use, but so long as he maintains the use he must submit to the control." These cases establish the control of the legislature over all corporations, where, in the judgment of the court, their business affects the public interest.

What would John Marshall and Joseph Story have said to such a proposition? Could any business have more closely affected the public than that of Dartmouth College? In that case, says Marshall: "The object of the incorporating act was for the promotion of Christianity and education generally, not the interest of New Hampshire particularly." Judge Field echoed the sentiments of the old court when he wrote: "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for residences of families, nor, indeed anything like so great an interest; and according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rent prescribed he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and 'he may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and

periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted so far as I am aware, by any judicial tribunal in the United States." (*Munn* v. *Ill.*, *94 U. S. 141*). And again he says: "To what purpose can the constitutional prohibition upon the state against impairing the obligation of contracts be invoked, if the state can, in the face of a charter authorizing a company to charge reasonable rates, prescribe what rates shall be deemed reasonable for services rendered?" (*Stone* v. *Wisconsin*, *94 U. S. 187*).

As in the Charles River Bridge case, the court in these later cases has, by each succeeding step, distinguished or overruled the doctrines of the Dartmouth College case in the particulars referred to without once mentioned that great judgment. To be sure, in Story's masterpiece (the dissenting opinion in the Bridge case) and in the dissenting opinions in each of the other cases, the departure is pointed out but never in the opinion of the court. The original opinion is not openly attacked but is undermined with the theory of public use. It has been stated that these departures have wrung from the court by outside pressure and certainly they are in the line of modern public thought and demand, if not in the line of professional opinion.

Certainly, the public sentiment can not endorse one of the remaining outgrowths of this case which still receives the sanction of the Supreme Court, which holds that the legislatures may exempt the property of a corporation from taxation and that if the state afterwards passes a law taxing property of the corporation it passes a law violating the obligation of a contract and that such a law is void under the Constitution.

I think that Justice Miller's dissenting opinion in the Rouse cases (*University* v. *Rouse*, *8 Wall*, *443*) voices the sentiment of the public and the growing opinion of the bar on this subject when he says: "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give or to bargain away forever the taxing power of the state. This is a

power, which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

"It cannot be maintained, that this power to bargain away, for an unlimited time, the right of taxation, if it exists at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can as well exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government.

"The result of such a principle, under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and heap all the burden of the support of government and the payment of its debts on those who are too poor or too honest to purchase such immunity.

"With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened in this view of the subject, but the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest againt a doctrine which we think must finally be abandoned."

To avoid the great abuses to the prejudice of the public, which have been mentioned in this paper, the people in many of the states have placed in their constitutions provisions reserving the right to alter, amend or repeal all laws that may be passed conferring corporate powers. These provisions, of course, take effect only from the time of their adoption, and the courts are still occupied under the authority of John Marshall's judgment, in protecting the corporations which had previously received grants. *Mobile & Ohio R. R.*, v. *Tennessee*, *153 U. S. 486*.

Every law, written or unwritten, must rest in the sanction of those affected by it. No court may promulgate a doctrine which is not founded in the good sense of the people and have it respected. Changes in the methods of business, the morals and even the political views of the country are gradually reflected in the statutes of the legislature and the opinions of the courts; and the most casual observer cannot fail to see that the authority of the Dartmouth College Case is fast passing away.

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METCALF B. HATCH.
GEORGE P. PALMER.

## *NOTES.*

THE CONCLUSIVENESS OF FOREIGN JUDGMENTS.—The cases of *Hilton* v. *Guyot and Richie* v. *McMullin*, recently decided by the Supreme Court of the United States, seem to have founded the doctrine that while judgments of foreign tribunals are prima facie conclusive, they are not so where there is a claim that they were obtained by fraud. This is especially true with reference to those countries from which the principles of international comity receive no recognition. The question as to just how far foreign judgments should be deemed conclusive is by no means clearly established. However, if the validity of such a judgment is attacked it becomes the duty of the court to which it is submitted to make a careful examination of all the facts. In the case of *Hilton* v. *Guyot* Justice Gray who read the opinion said that this particular judgment, if the offers of proof which the defendants made, and which the court below rejected, were substantiated, could not be enforced in France nor in England, nor in any civilized country in Europe. If this suit had been brought in any other country, he said, the judgment would have had to be examined, and its value should be recognized in the United States only so far as France exercises judicial discretion in similar cases. The case of *Ritchie* v. *McMullin* invoked the question of conclusiveness of a Canadian judgment, but as there was no allegation of fraud and merely of error, the Supreme Court affirmed the decision holding the judgment conclusive.

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THE "TORRENS" SYSTEM—The "Torrens" system of land transfers is exciting wide-spread interest and agitation at this time, and bids fair by its general adoption to do away entirely with abstracts of title. The Illinois State Legislature has taken the initiative, and although the act is not operative in any County until approved by popular vote, it is confidently believed that its universal adoption will speedily result. That it is a move in the right direction must

be apparent to all who are familiar with the tedious and cumbersome system of title transfer and registration now in vogue. By the new method, every question whether it be formal or substantive, is finally disposed of at the time the transfer is made so that the certificate of title will admit of nothing affecting the title or interest intended to be conveyed. The many vicissitudes through which a title may have passed are thus rendered inconsequential. The title itself is registered as distinguished from the registration of the accumulated evidences of title. In the registrar's office a much simpler routine will suffice, and very few books will be imperative. Virtually a ledger account is kept with each piece of property, and reference to the tract index will indicate the page on which one may ascertain at a glance the precise condition of the title. Transfers of property and liens upon the same will be of no effect unless entered upon the record, and this requirement will serve to abolish the acquisition of title by adverse possession. The registration of title under this method is not strictly enjoined in the first instance, but once registered the title must remain subject to the system. The offices of recorder and registrar are kept conjointly, and the recorder is ex-officio registrar of titles in his county. The Examiners of title, who are deputies of the registrar, are the only new clerkships created by the innovation.

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DOES SUICIDE BAR RECOVERY ON A LIFE INSURANCE POLICY? —There seems to be no direct authority either in this country or in Europe upon the question whether suicide by the assured whilst in the full possession of his faculties avoids the policy. This point was recently brought up in the case of *Ritter, Executor* v. *The Mutual Life Insurance Co.*, in the United States Circuit Court for the Eastern District of Pennsylvania. The Defendant's first request to charge was as follows: "There can be no recovery by the estate of the dead man of the amount of policies of insurance upon his life, if he took his own life designedly, whilst of sound mind." This request was granted though as said in the charge "there is nothing to be found on the subject but dicta and this is conflicting, and there is no evidence before the court of any custom in the business of insurance bearing on the subject." The Companies almost invariably provide against the commission of suicide by special clauses by which the policy is to be null and void in case of suicide. The question in this case was whether in the absence of such a stipulation the fact of suicide alone avoided the policy. The Court charged the jury that if they found that the deceased was in a sane condition of mind at the time . . , able to understand the moral character and consequenses of his act, his suicide is a defence to this suit." The plaintiff requested the court to charge that "if one whose life is insured intentionally kills himself when his reasoning faculties

are so far impaired by insanity that he is unable to understand the moral charater of his act, even if he does understand its physical nature, consequences and effect, such self-destruction will not of itself prevent recovery upon the policies." This was also granted and is in accord with the great weight of authority. This has frequently been held to be true even where there is a condition in the policy making it void in case the assured takes his own life. *John Hancock Mut. Life Ins. Co.* v. *Moore, 34 Mich. 41; Conn. Mut. Life Ins. Co.* v. *Akens, 150 U. S. 468.* However where there was a clause in the policy by which it was to become null and void if the insured died by his own hand, *sane or insane*, it was held that the policy could not be recovered upon. *Streeter* v. *Insurance Co., 65 Mich. 199; Bigelow* v. *Berkshire Ins. Co., 93 U. S. 284.*

The question was also raised whether the fact of suicide overthrew the usual presumption of sanity, but the Court instructed the jury that while suicide may be used as evidence of insanity, standing alone it is not sufficient to establish it.

## *BOOK REVIEWS.*

TIFFANY ON SALES.—Hand-book of the Law of Sales. By FRANCIS B. TIFFANY, author of Death by Wrongful Act, St. Paul: West Publishing Co, One vol., 8vo. 348 pp. $3.75.

This is the eighth volume of the "Hornbook Series." The author claims for it no great amount of originality and does not proclaim it to be an innovation which will "fill a long felt want." He has wisely confined himself to the task of rearranging the law upon this important subject and, with the aid of the publishers art, putting it in form for easy reading and quick understanding by the student. The admirable features of the works of both Benjamin and Chalmers have been copied. To the needs of the student, for whom it is primarily intended, the work is especially adapted.

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THOMPSON ON CORPORATIONS.—Commentaries on the Law of Private Corporations. By SEYMOUR D. THOMPSON, LL. D., San Francisco. Bancroft-Whitney Company. Six vol., 8vo. $36.00. Vol. IV.

We have in a previous number[1] had something to say of this work, particulary of the first three volumes. Volume IV is now on our table. It is a little larger than any of its predecessors. It contains 1243 pages of text and comprises six of the nineteen titles into which the whole work is divided. These are again divided into 41 chapters and sub-divided into 1372 sections. Following the example of the proceding volumes, it is prefixed by an admirable table of contents covering 39 pages. The volume opens with the consideration of the rights and remedies of members and share-holders. Under this title the rights of membership are first discussed, followed by a thorough examination into the various rights and remedies of share-holders, their extent, and the forms of relief and actions to secure the same. "Ministerial Officers and Agents" is the next title taken up. There is a great fund of information contained in the eight chapters of this title. The powers and liabilities of corporate officers and corporate agents are all thoroughly considered. The chapters upon bank cashiers, bank tellers, and managing agents are of particular interest and value. Title nine treats of the formal execution of corporate contracts in an exhaustive manner. In title ten is considered notice, estoppel and ratification. Corporate franchises, privileges and exemptions are discussed under title eleven. The concluding title is upon corporate powers and the doctrine of *ultra vires*.

1. 4 Mich. Law Jour. 210 (June, 1895).

# LEGAL MISCELLANY.

*Editor Michigan Law Journal:*—I see that in the Michigan Reports commencing with Volume 97, the Reporter has added quite full notes to many of the cases. In this he has conferred a favor both upon the bench and bar, which, I have no doubt, will be appreciated by them. It greatly facilitates looking up a law case by having accurate and copious references to the former opinions of the Court upon the question adjudicated, and in the midst of the hurry and push attending the actual trial of a case is of inestimable advantage to the trial judge and the lawyers engaged therein. I hope Mr. Fuller may see his way clear to continue this labor of adding these notes to cases, but the profession ought not to demand this at his hand, and should be grateful for the gratuity this far extended to them. Why would it not be a good idea for the next Legislature to provide for the publication of the reports with the notes of similar cases following each case reported? A sufficient salary should be provided for the Reporter so that he could afford to perform his work in this regard in a thoroughly reliable manner.

If our statutes shall be properly recompiled as I do not doubt they will be, with a proper and reliable digest of cases embodied, and followed afterwards with full, complete and reliable annotated Reports the time taken in looking up cases and on the trial of the same will be lessened and all be benefitted, including the litigant and tax-payers.

Would it not be wise for the members of the profession in the State to take united action in the matter to secure this result?—*Mark M. Powers, Grand Rapids, Mich.*

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A question of great practical importance in the law of partnership is as to what real estate will be considered partnership property. In *Robinson Bank* v. *Miller* (*Ill.*) *27 L. R. A. 449*, a partnership formed by persons owning undivided interests in a mill was held not to include the real estate as part of the partnership property. The annotation to this case collates and analyzes a vast multitude of authorities on the subject. A Maryland case reported with the former also holds that entering in partnership books and treating as partnership property real estate devised and conveyed to the partners individually is not sufficient to make it partnership property as against individual creditors, unless the entries were sufficient to satisfy the statute of frauds and the creditors were charged with notice by the use made of the property or otherwise. This is the case of *National Union Bank* v. *National Mechanics Bank*, *27 L. R. A. 476.*

# RECENT MICHIGAN DECISIONS.

ACTION AGAINST A SALOON KEEPER—SELLING LIQUOR TO HUSBAND—EVIDENCE—COMMISSION TO TAKE TESTIMONY—1. In an action against a saloon keeper for selling liquor to plaintiff's husband, thereby injuring her means of support, and her feelings, defendant will be liable for whatever damages plaintiff has sustained from his acts, though the husband was an habitual drunkard before such sales began. 2. Where the instructions annexed to a commission to take testimony required an oath to be publicly administered, the commissioner's return, showing that the testimony was taken at his office after the oath "prescribed by the instructions annexed to the commission" had been given, sufficiently shows that the oath was publicly administered, as required by How. Ann. St., Sec. 7439. 3. In an action against a saloon keeper for selling liquor to plaintiff's husband, whereby she was injured in her means of support and in her feelings, error in admitting testimony of the husband's death since the beginning of the action, and of his expectation of life as shown by the mortality tables, was not cured by an instruction that plaintiff could not recover damages in such action for the husband's death. *Ford* v. *Cheever.* (July 2.)

CREDIBILITY OF WITNESS—INSTRUCTION TO JURY—1. Where there is evidence that a witness has been convicted of a criminal offense, an instruction that the jury shall consider this fact in determining the credibility of his evidence is proper. 2. An instruction that the jury, in determining the credibility of the evidence of a witness, shall consider the fact that he has been interfered with by the police for ill treating his wife, is error, where there is no evidence of such fact. 3. It is error to charge that one testifying that he had never heard the reputation of a witness for truth and veracity questioned at all is not entitled to the same consideration as one who testifies that he has heard it questioned and discussed among the neighbors of such witnesses. *Conkey* v. *Carpenter.* (July 2,)

FALSE PRETENCES—COMPLAINT AND INFORMATION—DEFENSES—1. An information for an offense charged in a complaint may set out facts relating to the offense, brought out on examination, which were not set out in the complaint. 2. On a prosecution for obtaining money under false pretences, the fact that the defendant is able and willing to repay the money so obtained is no defense. 3. A complaint which alleges that defendant, for the purpose of obtaining a loan on certain property, representing that there was a house thereon of the value of $1,200, but that in fact there was none, charges a criminal offense. *People* v. *Oscar.* (July 2.)

FOREIGN INSURANCE COMPANIES—RIGHT TO SUE—COMPLIANCE WITH STATE LAWS—A foreign mutual benefit society which has failed to comply with the laws of the State and is therefore forbidden, under penalty to do business in the State, cannot sue to recover money assessed against its members in the State, and which was voluntarily paid by such members to defendant, its agent, for the use of the company, as the claim "arose out of" forbidden acts, within the statute. *Mut. Ben. Soc.* v. *Lester.* (July 2.)

GUARDIAN AND WARD—In a bill filed by a ward praying for an accounting from her guardian, it appearing that such guardian acted in good faith in the expenditure of the trust fund and that her charge was a just and reasonable allowance, and that the ward was in debt to such guardian, a decree dismissing the bill was not erroneous. *Tudhope* v. *Avery, Admr.* (July 2.)

INTOXICATING LIQUORS—CIVIL DAMAGES—ACTION ON BOND—Under 3 How. Ann. St., Sec. 2283e3, making "any person or persons" and, if licensed liquor dealers, the sureties on their bonds, who have furnished liquors to a person, liable "jointly and severally" for injuries suffered by others by such person's intoxication by said liquors, the principals and sureties on different bonds may be joined in a single action. *Frunklin* v. *Frey.* (July 2.)

MOTION IN ARREST OF JUDGMENT—REVIEW—1. The denial of a motion in arrest of judgment will be reviewed on appeal, though the trial judge gave no reason for his ruling. 2. An information under How. Ann. St. Sec. 9245, making it a penal offense to "convey into any jail" any instrument adapted to aid any person lawfully committed in escaping, with intent to facilitate his escape, which alleges that the instrument was conveyed "unto" the jail, is fatally defective, and cannot be amended under How. Ann. St., Sec. 9537, permitting an indictment to be amended in all cases where the variance between the facts alleged in the indictment and those proven are not material to the merits of the case. *People* v. *Rathbun.* (July 2.)

MUNICIPAL LAW—DEFECTIVE WALK—CONTRIBUTORY NEGLIGENCE—1. Where testimony shows that plaintiff stepped into a hole in the sidewalk made by the breaking away of a part of a plank and that the accident complained of happened in broad daylight, it is a proper question for the jury to decide whether or not plaintiff has not been guilty of contributory negligence, especially when the hole which caused the injury was proved by several witnesses to have existed several weeks. 2. Under the facts stated above a charge of the Court directing the jury to find for the Plaintiff is error. *Mackie* v. *Bay City.* (July 9.)

MUNICIPAL LAW—SALARY OF *de facto* OFFICER—1. A *de facto* officer of a municipality can compel the payment of the salary of the officer even while *quo warranto* proceedings are pending. 2. The salary paid to an officer to which he was entitled when paid cannot be recovered back, simply because certain provisions of the charter had not been observed in making the payment. 3. The payment of the salary fixed by law to an officer *de facto* while holding the office and discharging its duties is a complete answer to an action brought by a oficer *de jure* for salary during the same period of time. *Scott* v. *Crump, Mayor, etc.* (July 13.)

PLEADINGS—BILL OF PARTICULARS—BEST AND SECONDARY EVIDENCE—MONEY HAD AND RECEIVED—1. A bill of particulars describing generally the character of plaintiff's claim is sufficient to admit testimony of the contents thereof, unless defendant calls for a more specific bill. 2. It was not error to exclude secondary evidence of the contents of a writing, where its absence was not fully accounted for. 3. Where a written instrument recited that certain accounts were assigned to defendant for collection for a reasonable compensation, evidence that the assignor suggested 10 per cent. in lieu thereof is not admissible to fix the amount of such compensation. 4. It must be shown that a witness knows or has some means of knowing a fact before his testimony is admissible. 5. Whether certain goods in transit were included in a lost bill of sale is a question of fact for the jury. 6. An action for money had and received will lie against one with whom accounts were left for collection, he to pay creditors from the proceeds, on his refusal to account for the balance. *Tanner* v. *Page.* (July 2.)

SECURITY FOR COSTS—CONSTITUTIONALITY OF ACT—3 How. Ann. St., Sec. 7717e, providing that in actions for labor performed, the court shall not order security for costs where the plaintiff shall make an affidavit that he has a meritorious cause of action, and is unable to procure such security, is not unconstitutional, as giving special advantage to one class at the expense of another. *Jones* v. *Circuit Judge.* (July 2.)

SERVICE OF ATTACHMENT—APPEARANCE—WAIVER—1. Under How. Stat., Sec. 6840 and 6841, providing that the constable shall execute a writ of attachment at least six days before the return thereof, by seizing the goods, and serving, either personally or by substitution, a copy on defendant, a seizure made on the 19th, and service on the 24th, under writ returnable on the 28th, are void. 2. In attachment proceedings before a justice where the service was defective, an appearance and consent to an adjournment, "without prejudice," do not waive the defective service. *Tunningly* v. *Butcher.* (July 2.)

SPECIFIC PERFORMANCE—DEPOSIT OF DEEDS IN ESCROW—Where, under a contract to exchange real property, deeds were deposited in escrow, equity will decree a specific performance at the instance of a party who has performed the conditions on which the deeds were deposited. *Bowman* v. *Gork.* (July 2.)

UNDUE INFLUENCE—COMPETENCY TO EXECUTE DEED—The use of arguments addressed to the understanding and of appeals to convictions of right doing cannot be properly termed undue influence, and on such grounds a deed cannot be set aside as void, it appearing that there was sufficient mental ability in the grantor to render the execution of the deed valid. *Hammond* v. *Welton.* (July 9.)

## CURRENT LITERATURE.

"Leo XIII. and the Social Question" is the title of an interesting article in the *North American Review*, by the Rev. J. A. Zahm Professor of Physics at the University of Notre Dame, Indiana. A peculiar interest attaches itself to this contribution as having formed the subject of a conversation between his Holiness and Fr. Zahm. "The Turning of the Tide," by Worthington C. Ford, Chief of the Bureau of Statistics at Washington, shows conclusively that the financial depression of our country is at an end, and that a bright prospect is before us. "The New Administration in England," by Sir Charles W. Dilke, M. P., is an interesting and instructive article on British Politics.

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One of the subjects which is interesting the scientific world at present is Argon, the newly discoverd constituent of the atmosphere. This forms the subject of an interesting article in August *Popular Science Monthly*, by Dr. John Tappan, Professor of Chemistry in Smith College. Among the illustrated articles in this month's issue is an interesting discussion of "Apparatus for Extinguishing Fires," by John B. Morse. It gives the history of fire-fighting in the United States from the time when each inhabitant of Salem, Massachusetts was ordered to "be supplied with a ladder under penalty of five shillings," to the present day of self-propelling steam fire engines.

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"International Law in the Japanese War is one of the most interesting topics discussed in the July number of *Littell's Living Age*. The writer, T. E. Holland, Chichele Professor of International Law and Diplomacy in the University of Oxford, takes up each rule of warfare which governs civilized nations and shows how it was regarded or disregarded in the recent eastern conflict. A unique article appears in an early number of the month on "Advertising as a Trespass on the Public." In it Richardson Evans makes a plea for country roads, whose beauty he claims is fast being defaced by unsightly bill-boards which are an eyesore to the public.

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*Public Opinion* is catering to the popular demand for something about Napoleon. This "Napoleonic craze," as it has been aptly termed, has provided a fruitful subject for a great many writers, Some of their productions have been worthy, while others under ordinary conditions would have been given an early consignment in the waste-basket. Foremost among the former class is the life of Napoleon by Miss Tarbell, which appeared serially in *McClure's Magazine*. This is now published in a handsome cloth bound volume, profusely illustrated, and is given by *Public Opinion* to its new subscribers.

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The August *American Magazine of Civics* contains two interesting articles on that all absorbing topic "Money," "Bimetallism and Currency," by Joshua Douglass, and "A Plea for a Sound Currency and Banking System," by Allen Ripley Foote. The former article is one of peculiar interest at this time when the subject is receiving so much attention from all sections of the country and all classes of people. It gives a very good idea of the legislation on the subject in this country and presents a strong case for the silver side. Other articles in the August number are "A Cure for the Gerrymander," by John Haynes; "The True Basis of Political Reform," and "The Necessity of State Labor Tribunals."

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The August *Review of Reviews* contains "Theodore Roosevelt," a Character Sketch, by Julian Ralph; "The Clearing of Mulberry Bend," the story of the rise and fall of a typical New York slum, by Jacob A. Riis; "The Third Salisbury Cabinet," by W. T. Stead. Among the leading articles of the month discussed are "Six Years of Civil Service Reform," "Suggestions from New Zealand," "Our Surplus Grain." "Wendell Phillips on Public Speaking," and "The Brighter Side of Chinsse Life."

# MICHIGAN LAW JOURNAL.

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## *ADDRESS OF WELCOME DELIVERED BY HON. DON M. DICKINSON BEFORE THE AMERICAN BAR ASSOCIATION.*

It was with one voice that the bar of Michigan, intending in the selection to show you the highest consideration in our power, named as our spokesman to greet you and to welcome you to the state, our beloved and distinguished leader, George V. N. Lothrop.

It is with regret, therefore, that I am compelled to announce that his condition of health will prevent the appearing before you in this place, and that the office has been allotted to me to tell you how glad we are to have you here. The state of Michigan opens her great heart to you, and her inland seas send you a smiling welcome on the face of their blue waters that pass our doors on their way to Niagara and the Atlantic.

As a representative here of all our people, chosen to speak for them on this occasion, I do most heartily thank you for coming to us, and bid you a most cordial welcome. At the same time, whether we say it or not, the most of us feel way down in our innermost hearts, that you are to be congratulated because of your happy lot of being in Michigan, even for a short time, and upon your exceptionally felicitous choice of Detroit as a place of meeting. We look about us upon our intelligent people, our peerless system of education, our natural resources, our mighty commerce, our beautiful land and our great waterways, and seeing our possessions and what we have done withal, we reflect that we are not as the rich and effete east, or as the cruder and sometimes rude and strident west, or as the full-blooded and impulsive south, and we, admiring ourselves, say, that we are the true mean among them all, and that it is good to be truly the mean. Then we thank God, satisfied, and look out upon the rest of the world ready to make allowances for faults, foibles and shortcomings, in a spirit of broad Christian charity. Nevertheless, we like to be visited, so that those learned in our history and

importance, may come to an appreciation of their knowledge, and so that the unlearned may become wise.

A few days ago a senator of the United States from the great state of New York referred to the city of Detroit as situated on the shores of Lake Michigan!

Now, we would have him know, and all the rest of our friends of the Atlantic coast, who have never been west of Buffalo, know, that a commerce passes the port of Detroit in but the seven months of open navigation, seven times as great, in tonnage of merchandise as the entire year's carrying trade of the North Atlantic highway, and more than twice as great as the combined entries and clearances of the whole world at the ports of New York and Liverpool together. In the summer of 1893, a member of the Supreme Court of the United States—one of the most eminent men produced by this republic, and one of the greatest judges who ever wore the ermine, spent a month within sight of the two endless processions of shipping that pass each other on this water road. Mere statistics had not greatly impressed him, but the actual view of the living facts filled him with astonished conviction. To that visit more than anything else, I believe, does our fresh water Neptune owe his belt and spur of knight; for in December, 1893, the court gave to our lakes and connecting rivers the full legal title and dignity of "high seas," rankiug with the oceans and seas of the world. I say, in passing, that now, with our sister states of the northwest, we are asking, with more and more urgency—nay, we will soon demand, from the United States, a free, and above all, a wholly American outlet to tide water, so that we may ship our goods to every open port on the earth without change of bulk.

In agriculture, Michigan's resources can feed all nations; in building material we can build cottages and palaces for them all; we can gridiron the world with our iron and steel, and from our manufactories can equip the lines with rolling stock. We produce the most and best iron of any state or nation.

Our copper product is now at least half of the world's supply. Copper mining is remunerative, but I suggest to our fellow-citizens of the United States from abroad, that it would pay us better if the government would open its mints to the free and unlimited coinage of copper as money, impose the legal tender quality, fix a ratio (at any figure—that is not material) with gold and silver, and then maintain the parity of the three metals with all the financial resources of the republic, "independently of and without waiting for the

assent of foreign nations." Michigan would like this, and if it should turn out well, we might, following Lycurgus, try it with our iron by and by. But that's another story, as Kipling would say.

And I want to tell you something about your immediate hostess, the fair city of Detroit. You have been introduced—you do not know her.

Some one said, not long ago, that the founders of our town modeled it after the city of Washington, as Washington was modeled from Versailles, and Versailles from a cobweb. But before Louis XIV. had finished his palace at Versailles—the beginning of the city—before Washington was dreamed of—nay, before the Father of his Country was born, and while his father Augustine was yet a child of 8 years, Detroit was founded.

As English song and story impress one with the mistiness of the long past, by the admixture of Celtic myth with history, when they tell of King Arthur and Sir Lancelot and Guinevere, so the beautiful tale of Evangeline, like another Aeneid, relating the expulsion and the wanderings of a people from their country, seems of a time almost lost in an age long gone. Yet Detroit had been a vigorous historic fact for half a century when her citizens opened her gates and their hearts and homes to many of the sad and weary Acadian exiles, driven from their homes by England. Nay more, we

"Gave them of the corn land
That was of public right,
As much as two strong oxen
Could plow from morn' to night."

And they and their descendants have abided with us unto this day.

Before St. Petersburg was founded by Peter the Great—Detroit was.

More than six decades before the birth of Napoleon; when Louis the Grand had turned pious and was in the zenith of his power; when James II. of England was living an exile at the court of France; when William of Orange was England's sovereign, and Peter the Great ruled Russia and was the dread of Europe—this town had come to stay.

When Cotton Mather published his Magnalia; twenty years before potatoes were known in America; before there was a newspaper or postoffice in the colonies; before the great war of the Spanish secession; more than forty years before the Highlanders went down with King Charlie before the English at Culloden; nearly sixty years before Wolfe died on the plains of Abraham and Canada be-

came English; fifty years before Washington, in his early 20s, was with Braddock at Fort Duquesne, and fifty years before Franklin flew his kite; long before George III. was born—Detroit was receiving visitors within her borders, with the same warmth of hospitality with which we greet you. We had passed three score and ten when Boston gave her first sucessful tea party; when the first cabin was built in Kentucky; when Daniel Boone was first heard of; when the embattled farmers stood and fired the shot heard around the world. Before New Orleans was thought of; when Baltimore and Savannah were founded; before there was an English settlement in Vermont—Detroit had twice enlarged her stockade to take in the population for whom there had ceased to be room within it.

Detroit's sons have shed their blood in all the wars of the colonies and of the republic. They have charged for the golden lilies of France, defended the cross of St. George, and been represented in every battle on the side of Old Glory since it first floated.

We take just pride in our ancestors, and their descendants from gallant France; aside from these, Michigan's people are great grandsons and grandsons of New England, and sons and grandsons of Central and Northern New York—albeit, we are broader and cleverer Americans than our forbears.

Such as we are, Michigan and Detroit salute you with honor. We wanted you to know that we receive you on classic ground, with the influence of nearly two centuries of an always progressive civilization about you. It is fitting that the representatives of the bar of this country should meet in the state of that bench, whose judgments were and are confidently cited as authoritative wherever law is administered—the bench of Campbell, Cooley, Christiancy, and Graves. We greet you in the federal circuit of such jurists as McLean, Waite, Swayne, and of him who has lately gone to his reward of a life well lived and of a judicial career unexcelled for rectitude, justice and ability by any one of them—I refer to the lamented Howell E. Jackson.

Mr. Chairman and gentlemen, we wish you success in your deliberations in the broadest sense. We would like this meeting to be a memorable one; and while we would not interfere with your labors, we must insist that the best economy of time dictates that you shall occasionally turn aside from the road you are following, for rest, and while you are in this pleasant land, we propose to lead you by the still waters and make you to lie down in green pastures.

And so good-night.

# ANNUAL ADDRESS DELIVERED BEFORE THE AMERICAN BAR ASSOCIATION BY JUDGE WILLIAM H. TAFT.

Mr. President and Gentlemen:—Within the last four years the governors of five or more states have thought it proper in their official messages to declare that the federal courts have seized jurisdiction, not rightly theirs, and have exercised it to the detriment of the republic, and to urge their respective legislatures to petition congress for remedial legislation to prevent future usurpation. One legislature did present a memorial to congress reciting the grievances of the people of its state against the federal judiciary and asking curtailment of the powers unlawfully assumed by them.

The principal charge against the federal courts which an examination of these documents discloses, is that they have flagrantly usurped jurisdiction first to protect corporations and perpetuate their many abuses, and second to oppress and destroy the power of organized labor.

These charges against the federal judiciary have not been confined to messages from state governors. They also come from persons who, although not holding high offices, have a standing before the bar which entitles them to respectful attention. Much of what is found in the official communications, I have referred to, concerning the treatment of corporations by the federal courts, has taken form from the articles and addresses of the editor of the American Law Review. This gentleman, well known as an able and prominent law text writer has given much attention to the federal decisions on corporate matters and has expressed his condemnation of many of them in language that has lacked nothing in freedom, emphasis or rhetorical figure. The one judicial system to which all the members of this association bear the same relation, is that of the United States, and when I was honored with an invitation to address them, it at once occurred to me that I might properly ask their attention to a temperate discussion of the justice of these criticisms.

I have since been oppressed with the thought that the theme might with more propriety be left to one having no official relation

to the federal courts, but circumstances have prevented any change from my original impulse. I can only hope that my recent admission to the inferior ranks of the federal judiciary and my humble position therein will prevent the suggestion that what is here to be said has anything in it either of a personal defense, or of a quasi official character.

The right and opportunity freely and publicly to criticise judicial action are of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their judgments, and anxiously solicitous to do exact justice than the conciousness that every act of theirs is to be subjected to the intelligent scrutiny of their fellow men, and to their candid criticism. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus have a strong influence to secure uniformity of decision. But non-professional criticism is by no means without its uses, even if accompanied as it often is by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common sense the protest of many average men may evidence a defect in a judicial conclusion though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just conclusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge, but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who cannot be reached and made to pause and deliberate by hostile public criticism.

In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance because it is the only practical and available instrument in the hands of a free people to keep their judges alive to the reasonable demands of those they serve. On the other hand the danger of destroying the proper influence of judicial decisions,

by creating unfounded prejudices against the courts, justifies and requires that unjust attacks shall be met and answered. Courts must ultimately rest their defence upon the inherent strength of the opinions they deliver as the ground for their conclusions, and must trust to the calm and deliberate judgment of all the people as their best vindication. But the bar has much to do with the formation of that opinion, and a discussion before them may sometimes contain suggestions which bear good fruit. Many persons whose good opinion is a high compliment, regard the federal judiciary with so much favor that they would deprecate a consideration of the criticisms already stated, as likely to give an importance to them they do not deserve. I cannot concur in this view. I believe that in large sections of this country there are many sincere and honest citizens who credit all that has been said against the federal courts, and that it is of much importance that the reasons for the existence of these criticisms and their injustice be pointed out. It is not unfair to those governors who are the chief accusers of the federal judiciary to say that they knew that they were not speaking as they did to unwilling ears. They were merely putting into language the hostile feeling of certain of their constituents toward the federal courts, and but for such feeling the criticisms would hardly have been uttered. It will in a large measure account for them, if we account for the popular sentiment they express.

It will be my endeavor therefore first to show that much if not all of the present hostility to the federal courts in certain parts of the country and among certain groups of the people can be traced to causes over which those courts can exercise no control, and is necessarily due to the character of the jurisdiction with which they are vested, and not to injustice in its exercise; and second that the criticisms which such hostility has engendered are in themselves without foundation.

The federal judiciary was the arbiter in the first great political controversy of the United States, and one which is continually reappearing in various forms. The general language of the constitution required construction to apply it to cases arising in the organization and maintenance of the government. The two parties which had engaged in heated controversy over the adoption of the covenant at all continued it over its narrow or broad interpretation. The Supreme Court in the beginning was made up largely of men whose predilection was for a liberal construction, and who believed thoroughly in the national idea. This was soon manifest in their

decisions which brought down upon the court the anathema of the strict constructionists whose great effort it thereupon became to weaken tne judiciary. It was attempted to control their independence by making very wide the grounds for impeachment. The great chief justice was constantly threatened with this fate by partisans, and the attacks upon his alleged usurpations were frequent and fierce. Jefferson's severe words concerning the federal judiciary, now so often quoted by their latter day critics were written about 1820 as the result of a decision in Cohens v. Virginia, reaffirming the power sf the Supreme Court of the United States on the validity of a state law.

The change of feeling toward the federal courts because of the change in their jurisdiction with respect to the negro race affords an apt illustration of how mere jurisdiction may affect the popular feeling toward a court. Before the war the southern people had not looked with disfavor upon courts which did so much to preserve their property while the abolitionists regarded them with aversion. After the war, when for the protection of the negro in his electoral and civil rights bill were passed and their enforcement was given to the federal courts, they became at the same time the objects of hatred and condemnation at the south and the great reliance of those who had been abolitionists at the north. Now that both parties have wisely decided to let the election problem work itself out and to await the local solution which the results of fraud and violence in elections will compel, the feeling of hostility at the south against the federal judiciary has greatly abated.

The last two generations have witnessed a marvelous material development. It has been effected by the organization and enforced corporation of simple elements that for a long time previous had been separately used. The organization of powerful machines or of delicate devices by which the producing power of man was increased fifty or 100 fold was, however, not the only step in this great progress. The aim of all material civilization in its hard contest with nature was, and is, the reduction of the cost of production, for thereby each man's day's work nets him more of the comforts of life. Within the limits of efficient administration the larger the amount to be produced at one time and under one management, the less the expense per unit. Therefore the aggregation of capital the other essential element with labor in producing anything, became an obvious means of securing economy in the manufacture of everything. Corporations had long been known as convenient commercial instru-

ments for securing and wielding efficiently such aggregations of capital. Charters were at first conferred by special act upon particular individuals, and with varying powers, but so great became the advantage of incorporation with the facility afforded for managing great enterprises, and the limitation of the liability of investors, that it was deemed wise in this conntry, in order to prevent favoritism, to create corporations by general laws, and thus to afford to all who wished it the opportunity of assuming a corporate character, in accordance therewith. The result was a great increase in the number of corporations and the assumption of the corporate form by seven-eighths of the active capital of the country. The great saving in the cost of production brought about hy mechanical inventions and the organization of capital worked incalculable benefit to the public, but the necessary price of it under our system of free right of contract and inviolate right of private property was a division of the profit between those who were to consume the product and those whose minds conceived and whose hands executed the work of production. The total wealth of the whole country was thus enormously increased, but of the increase more was necessarily accumulated in some hands than others. In the general prosperity caused by the revolution in the methods of production captains of industry amassed fabulous fortunes, and the aggregations of capital under corporate management became so great as to stagger the imagination. In the mad rush for money which previous successes had stimulated, it is not to be wondered at that some of the accumulated wealth was corruptly used to secure undue business advantages from legislative and executive sources, and that many of the political agencies of the people became tainted. The impersonal character of corporations afforded a freedom from that restraint in the use of money for political corruption which is often present when the would-be briber is an individual- Men of good repute with complaicence and intentioual ignorance acquiesced in the use of corporate funds to buy legislators and councilmen in the corporate interest when they would not wish or dare to adopt such methods in their individual business. The enormous increase in corporate wealth furnished the means of corruption, and the prospect of ill-gotten gains attracted the dishonest trickster into politics and debauched the weak, while the honest and courageous were often driven into private life. The genius of corruption in politics which the corporation called up has lived to plague them, and although great companies have secured all they wish from legislative bodies they are regarded by the political black-

mailers as fair game, and their corruption fund must still be maintained to prevent oppression. The people not unjustly have charged all of these evils to the management of corporations.

Another evil has been the injustice done to the real owners of corporate property by the reckless and dishonest management of its nominal owners. The great liberality of the general laws for the formation of corporations and the entire failure to exercise any stringent visitorial powers over them have enabled the active promoters and managers of large enterprises carried on at a distance from the homes of the real owners to increase the corporate indebtedness and capital stock so far beyond any fair valuation of their property as to put the entire control of it in the hands of the holders of worthless stock who have nothing at stake in the corporate success. The real owners, the bondholders, are at the mercy of this irresponsible management till insolvency comes. The reckless business methods which such an irresponsibility and lack of supervision invite create an unhealthy and feverish competition in every market, wholly unrestrained by the natural caution which the real owner of a business must feel. The concern is kept going with no hope of legitimate profit, but simply to pay large salaries, or to favor unduly some other enterprise in which the managers have a real interest.

The prejudice against corporations has led to much legislation hostile to corporations both resident and non-resident. It takes the form of discriminating taxation of the regulation of rates to be charged by those companies engaged in quasi public business and sometimes of the direct deprivation of vested rights. In all such cases resort is at once had to the inferior Federal Court by the corporations injuriously affected to test the validity of the state's action and it not infrequently happens that it becomes the duty of such court to declare the legislation involved void, and to enjoin state officers from seizing or injuring the property of corporations under its provisions. Such a decision in a corporation hating community at once tends to mark the Federal Courts as friends and protectors of corporations.

The real abuses, however, find their chief cause in political corruption which it is wholly beyond the power of the Federal Courts to prevent or eradicate. Too frequently the popular impulse is to remedy or punish the evil by giving judgment against the great corporations in every case no matter what the particular issues of facts are, on the ground that the corporation has probably increased its capital or attained its success by corrupt methods. It is hardly necessary to point out that this mode of punishment by forfeiture and chance

distribution cannot be countenanced in a court of justice, however meritorious the cause of complaint upon which it is founded. The bribery of which many corporations are guilty is most difficult of legal proof and crimes of this character are usually committed against the state so that Federal Courts have no cognizance of them.

The combinations known as trusts are now before the state courts, and I have no doubt from their decisions that legislation, which experience will suggest both by way of supervision over corporations and by criminal laws, will suppress much of their evil methods. It is settled and rightly settled submit that the national government can do nothing in this direction except where interstate commerce is directly affected by them, and not where in the course of their operation interstate commerce may occur as an incident.

The main public evil of corporate growth is the corruption of politics and reforms of such wrongs must come from the people, not from the courts.

The Supreme Court is invective and epithet by critics for refusing to hold in the sugar trust case that the power to regulate interstate commerce includes within it the power to inhibit the purchase by one company of substantially all the plants for refining sugar in this country for the purpose of controlling its sugar markets. To extend the federal regulation of interstate commerce to that of the purchase of the means of producing a commodity which when produced, is to be the subject of commerce both state and interstate, requires a construction of the interstate commerce clause so broad, that if accepted, it would have been difficult to fix a limit beyond which congress might not go in its control of mercantile business and manufacturing in every community. It might have given real ground for the charge so often made that through federal judicial decisions rights of the states are being absorbed in the national government.

The appointment of receivers to operate railroads pending suits in foreclosure and creditors' bills, instead of being an abuse of authority by the federal courts, was a most commendable use of an ordinary equitable means of preserving the status quo with respect to a new kind of property and a pressing emergency. Generally no one but the parties are interested in preserving the subject matter of the suit as a going concern till it can be sold, but in the case of a railroad the public are even more interested than the parties in having this done.

"On the whole when the charges made against federal courts of

favoritism toward corporations are stripped of their rhetoric and epithet, and the specific instances upon which the charges are founded are reviewed, it appears that the action of the courts complained of was not only reasonable, but rested on precedents established, decades ago, and fully acquiesced in since, and that the real ground of the complaint is that the constitutional and statutory jurisdiction of the federal courts is of such a character that it is freely invoked by corporations to avoid some of the manifest injustice which a justifiable hostility to the corrupt methods of many of them inclines legislatures and juries and others to inflict upon all of them.

We come finally to the relation of the federal courts to organized labor. The capitalist and the laborer share the profit of production. The more capital in active employment, the more work there is to do, and the more work there is to do, the more laborers are needed. The greater the need of laborers, the better their pay per man. It is clearly in the interest of those who work that capital shall increase more rapidly than they do. Everything, therefore, having a legitimate tendency to increase the accumulation of wealth and its use for production will give each workingman a larger share of the joint result of capital and labor, and it is in a large measure because this country has grown more rapidly in capital than in population that wages have steadily increased. But while it is in the common interest of labor and capital to increase the fruits of production yet in determining the share of each their interests are plainly opposed. Though the law of supply and demand will doubtless in the end be the most potent influence in fixing this division, yet during the gradual adjustment to the changing markets and the varying financial conditions, capital will surely have the advantage unless labor takes united action.

"Like corporations, labor unions do great good and much evil. The more conservatively and intelligently conducted they are the more benefit they confer on their members. The more completely they yield to the dominion of those among them who are intemperate of expression and violent and lawless in their methods the more evil they do to themselves and society. Unfortunately there are large organizations of the latter class, and in the heat of a bitter contest with employers, rights of person and property are sometimes openly violated in avowed support of the cause of labor. Infractions of the law, actual and threatened, are palpable, and the interference of the courts by all their usual processes to prevent irreparable injury to business and property becomes necessary. Such judicial

action usually results in discouraging the whole movement, and brings down upon the courts the fierce denunciations of the defeated leaders and arouses the hostility of many who would not join in the open breaches of the law, and yet so sympathize with the cause as to blind them to the necessity of their suppression.

"The employes of railroad companies and others engaged in transportation of freight and passengers generally have well organized unions, and the controversies arising over wages and other issues have been many. A vast majority of these have been settled without extreme measures through the conservative influence of level-headed labor leaders and railroad managers, but in the last twenty years there have been some very extended railroad strikes, accompanied by boycotts and open violence with which society has now become familiar."

As a matter of fact there is nothing in any federal decision directed against the organization of labor to maintain wages, and to secure terms of employment otherwise favorable. The courts so far as they have expressed themselves on the subject recognize the right of men for a lawful purpose to combine to leave their employment at the same time, and to use the inconvenience this may cause to their employer as a legitimate weapon in the frequently recurring controversy as to the amount of wages. It is only when the combination is for an unlawful purpose, or when an unlawful injury is thereby sought to be inflicted that the combination has received the condemnation of federal as well as of state courts.

The action of the federal courts all over the country in the recent American Railway Union strike in issuing injunctions to prevent further unlawful interference with the carrying of the mails, and the flow of interstate commerce by the strikers followed by the commitment for contempt of the strike leaders who defied the injunctions served on time, is what has called out the official protests of the governors of Illinois and Colorado, and the phrase "Government by injunction" has been invented to describe the alleged usurpation of power by the federal tribunals in this crisis.

When the history of the great strike shall be written in years to come, the absurd expectations and purpose of its projectors and their marvelous success in deluding a myriad of followers into their active support will seem even more difficult of explanation than it does to-day. The mind that would conceive and so far execute the plan of taking the entire population of this country by the throat to compel them to effect the settlement of a local labor

trouble in Chicago was that of a genius however misdirected. The governor of Illinois, who coined the phrase "government by injunction," says that the Federal Courts have added legislative and executive functions to their ordinary judicial offices, in that they have declared in their orders of injunction that to be unlawful which was lawful before, and have sought to enforce obedience to such orders by an army of marshals and soldiers. It is a little difficult to understand the working of a mind having the discipline of a legal training and the experience of a judicial service which can honestly and sincerely maintain (and I do wish to impugn the sincerity of the governor of Illinois) that the combination and conspiracy described in the bill in the Debs case and enjoined in the order of injunction was not unlawful. If it was not so, then there is no law in this country securing the right of private property, no law authorizing the federal government to operate the mails, no law by which the regulation of interstate commerce is vested in the general government.

"A public nuisance more complete in all its features than that which Debs and his colleagues were engaged in furthering cannot be imagined.

"The earlier assaults upon the federal judiciary and their harmless character in the light of the event reconciles one to much of the fiery invective and blood-curdling epithet hurled at men who equally with their accusers are American freemen, impressed with the absolute necessity for maintaining sacred the guarantees of life, liberty and property, and who are probably not more in love with corruption and greed or more disposed to crush the humble and worthy than the average of their fellow-citizens.

"The saving grace of American humor, which delights in the contemplation of grotesque exaggeration, has often saved us from domestic turbulence which the turgid exuberance of denunciatory language might otherwise have excited against lawfully constituted authority; and it may be that the same useful trait will prevent the success of the present agitators against the federal judiciary.

"But whatever fate betide their future, I hope that it may always be said of them as a whole, by the impartial observer of their conduct, that they have not greatly lacked in the two essentials of judicial moral character, a sincere desire to reach right conclusions and firmness to enforce them."

## *A BETTER EDUCATION THE GREAT NEED OF THE PROFESSION. An Abstract of a Paper Read by Justice Brewer before the American Bar Association.*

The administration of justice would soon be considered a mockery if first impressions controlled every case. But greater expedition can be obtained without detracting from fullest examination and consideration. Shorten the time of process. Curtail the right of continuances. When once a case has been commenced deny to every other court the right to interfere, or take jurisdiction of any matter that can be brought by either party into the pending litigation. Limit the right of review. Terminate all review in one Appellate Court. Reverse the rule of decision in Appellate Courts, and instead of assuming that injury was done if error is shown, require the party complaining of a judgment or decree to show affirmatively not merely that some error was committed in the trial court, but also that if that error had not been committed the result must necessarily have been different. It may be said that this would make reversals very difficult to obtain. They should be difficult. The end of litigation should be almost always in the trial court. Business men understand that it is best that the decisions of their committees of arbitration should be final and without any review. While some of our profession seem to think that justice is more likely to be secured if by repeated reviews in successive courts, even to the highest in the nation, the fees of counsel can be made to equal, if not exceed, the amount in controversy between the clients. In criminal cases there should be no appeal. I say it with reluctance, but the truth is that you can trust a jury to do justice to the accused with more safety than you can an appellate court to secure protection to the public by the speedy punishment of a criminal. To guard against any possible wrong to an accused a board of review and pardons might be created with power to set aside a conviction or reduce the punishment, if on the full record it appears not that a technical error has been committed, but that the defendant is not guilty or has been excessively punished.

The truth of it is, brethren, that in our desire to perfect a system of administration, one which shall finally extract from confused

masses of facts and fiction the absolute and ultimate verities, we forget that tardy justice is often gross injustice. We are putting too heavy burdens on our clients, as well as exhausting the patience of the public. Better an occasional blunder on the part of a jury or a justice of the peace than the habit of protracted litigation.

The idea of home rule and local self-government is growing in favor. Thoughtful men more and more see that the wise thing is to cast upon each community full responsibility for the management of its local affairs, and that the great danger to free government is in the centralization of power. Is it not in line with this thought that as far as possible the final settlement of all controversies which are in themselves local shall be by the immediate friends and neighbors of the litigants? Was not that the underlying thought of the jury as first established? And while we boast that the jury system is the great bulwark of our liberties, are we not in danger of undermining its strength and impairing its influence by the freedom of appeal? Is not the implication therein that the jury and the trial judge cannot be trusted, and is not the sense of responsibility taken away from both when they understand that no matter what they may decide some superior and supposed wiser tribunal is going to review their decisions and correct whatever of mistake they may make?

If our profession is to maintain its prominence, if it is going to continue the great profession, that which leads and directs the movements of society, a longer course of preparatory study must be required. A better education is the great need and the most important reform. The door of admission to the bar must swing on reluctant hinges and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counselor and the place of a leader.

Why is the higher education to-day the special need of the profession? Because, first, the law is a more intricate and difficult science than heretofore. Because, second, to preserve the confidence of community in the profession, each member must be qualified for the higher demands now made upon it.

Because, third, his mistakes are freighted with greater possibilities of injury. When business transactions are nothing more than an occasional barter of a chattel or a simple contract for labor a mistake works but little injury, and only to a few. But when they involve the great railroad and commercial dealings so common to-day, a mistake may be fruitful of large and widespread ruin. Because, fourth, society each day of its advancing civilization needs

and demands a wiser leadership. The welfare of humanity rests not on what has been accomplished, but on the steps forward which it takes. If those steps are wisely advised and prudently taken then we may confidently look for the coming on of the day of which poets have sung and which prophets have foretold, when peace and righteousness shall fill the earth. While, on the other hand, if illy advised and rashly taken, progress ceases and society resolves itself again into the anarchy and chaos from which it has so slowly arisen.

I know that mere education is not all sufficient. There must be a man to be educated. It is an old and true saying that you cannot make a silk purse out of the ear of the female swine. No more will any amount of study and training pour legal lore into some craniums or give that rare and blessed gift, common sense.

It may be objected that if the course of study is extended and the conditions of admission to the bar increased a great many will be deterred from entering the profession. A perfect answer is that a great many ought to be deterred. A growing multitude is crowding in who are not fit to be lawyers, who disgrace the profession after they are in it, who, in a scramble after a livelihood, are debasing the noblest of professions into the meanest of avocations, who, instead of being leaders and looked up to for advice and guidance, are despised as the hangers-on of police courts and the nibblers after crumbs which a dog ought to be ashamed to touch.

Even of those who love to keep up the dignity of the profession many find no adequate compensation for the practice, and so mingle with it dealing in insurance, real estate, and kindred matters to eke out the living the law does not furnish. It would be a blessing to the profession and to the community as well if some Noachian deluge would engulf half of those who have a license to practice. Webster's reply to the question whether the profession was not crowded was that the first story was full, but that there was plenty of room in the second. We should see to it that there be no first story and that only second story lawyers be found on our rolls.

Gaul and Teuton, Slav and Saxon will never become one people. Blood is thicker than water. Because individuals of these varied races come to this new land of ours and, dwelling as neighbors, are slowly moving towards one homogeneous people, it does not follow that the law of race will ever be forgotten or ignored in the native land. The vision of one great nation with a single parliament is only a poet's dream. But the lawyer will work out the final peace, and bring in the glad day when the spear shall be turned

into a plowshare and the sword into a pruning hook, and nations shall learn war no more. In each separate nation as it advances in civilization more and more are differences settled and rights adjusted by the lawyer and the judge rather than by pistol and bowie knife; so as the world advances in civilization will differences between nations be in like manner settled. Arbitrations are growing in favor, and international courts will soon be a part of the common life of the world. I know the time may seem far distant when any such court shall come into existence. It will be witness to a great advance in civilization. And yet within the last fortnight I have seen it stated in the papers that the French assembly has unanimously passed a resolution looking to the establishment of some tribunal of arbitration to settle all differences that may in the future arise between that nation and this country. The world is becoming familiar with international arbitrations and the settlement of disputes thereby; and every successful arbitration is but a harbinger of the day when all disputes between nations shall be settled in courts of peace, and not by the roar of cannon and waste of blood.

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EDITORS: ALFRED J. DUCHARME.
METCALF B. HATCH.
GEORGE P. PALMER.

## *NOTES.*

MICHIGAN BAR ASSOCIATION—The directors of the Michigan Bar Association held a meeting on August 30th to determine upon time and place for the next Annual Convention. It was decided that the Association should convene in Grand Rapids on May 14th and 15th, and Messrs. Wantz, Keeney and Stone were constituted a committee to arrange the programme. It is planned to procure some eminent speaker from abroad to deliver an address. The questions of legislative and law reform will be live issues before the next convention, and their consideration should influence a large and enthusiastic attendance.

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A PECULIAR DEFECT IN THE ENGLISH JUDICIAL SYSTEM.—It is a singular fact that under the English judicial system, in a considerable class of imputed crimes the accused is still forbidden to give evidence on his own behalf. Indeed the privilege is even now limited to a new class of offenses created by statute a few years since. In consequence, a man accused of a comparatively light crime may be allowed the privilege of giving evidence, while one who is accused of murder has no option to make himself a witness. English jurists contend that a person charged with crime rarely benefits his cause by giving testimony, and that for his own sake his silence should be compulsory. On the other hand the systems which obtain in most of the United States are in keeping with the loftier doctrine that an innocent man never injures his cause by relating the simple truth, together with the unanswerable logic that when a prisoner helps to convict himself he is furthering involuntarily the cause of justice. To our American sense of justice the English practice in this particular seems most barbarous. Until recently the accused in England was even precluded from making an unsworn statement, but this iron-clad rule has been modified to the extent that the prisoner

is now permitted to recite his own story, but not on oath nor subject to cross-examination. The nicety of the science of law seems paramount to every other consideration with the English lawyer, and the fate of an accused apparently depends upon the accident of the lawyer present, and not on the evidence produced in his favor or the contrary.

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THE FIRST ANNUAL NATIONAL CONVENTION OF COMMERCIAL LAWYERS.—On the 13th, 14th and 15th of August there was held in Detroit an important and highly successful convention, the gratifying result of which was the organization of a permanent association, which shall be a power to influence improved and uniform commercial legislation, better methods for the transaction of commercial law business, and to promote a pleasanter and more profitable relation among commercial lawyers themselves. Within recent years the commercial branch of the practice has developed an importance second to that of no other. With lines of commerce traversing the country in a veritable net work, offering every facility and encouragement to the transaction of business between parties separated by hundreds and thousands of miles, a vast number of commercial clients are frequently rendered dependent upon the tact and energy of lawyers who devote themselves to such interests. Faith in humanity to the extent of incurring the ordinary risks of credit in trade, and dependence in large measure upon the reputation and commercial ratings of the prospective buyer, are responsible for conditions so profitable to the commercial lawyer. The prevailing commercial law systems of the country, inevitably complex and varied, certainly contain elements of corruption a speedy eradication of which, it is to be hoped, may be accomplished by recourse to such heroic measures as may be deemed expedient. Precisely such an interchange of experiences and suggestions as was fostered by this first annual convention, should afford a strong working basis for radical reform. Every portion of the country was well and ably represented at the convention. Enthusiasm and harmony characterized its deliberations throughout. Among the papers read and thoroughly discussed at the convention were the following: "Is the Draft System a Detriment or a Benefit to the Lawyer?" "Relation of the Lawyer to the Business of Credit Reporting"; "The Lawyer and the Commercial Agency"; "What can this Convention do to Elevate the Standard and Improve the Conditions of the Commercial Law Business?" "The Best Office System for Handling Claims"; "Co-operative Organizations of Lawyers and the Effect of the same upon the Commercial Law Business"; "Bankruptcy Legislation"; "Diversity in Commercial Laws, and the Remedy." A permanent organization having been effected, officers for the ensuing year were elected as follows: President, William C. Sprague of Detroit; Corresponding Secretary, George S. Hull of Buffalo; Recording Sec-

retary, Joseph V. Wolfson of New Orleans; Treasurer, E. K. Sumerwell of New York City. As the constitution provides that the Vice-Presidents shall be elected by the various states, those officers were disposed accordingly. Omaha was selected as the place for the next annual convention.

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THE AMERICAN BAR ASSOCIATION.—The Eighteenth Annual Meeting of the Association was held in the city of Detroit during August 27th, 28th, 29th and 30th. The distinguished company was composed of judges and barristers, diplomats and statesmen, the most eminent our country affords, and Detroit opened wide her hospitable gates in full appreciation of the honor conferred and the golden opportunity presented for the entertainment of this representative body of scholarly men. The loftiness of the aims of the Association, and the vast importance of its labors can not be questioned, With an enrollment of nearly fifteen hundred members representing all but four states and territories, its scope is far reaching, its voice is heard and its influence felt. The constitution defines its object to be the advancement of the science of jurisprudence, promotion of the administration of justice and uniformity of legislation throughout the Union, the upholding of the honor of the profession and encouragement of cordial intercourse among the members of the bar. Through the able and assiduous efforts of commissions appointed or delegated by the Association, there have been wrought many highly commendable reforms in legal education and qualifications for admission to the bar, and in the direction of uniform legislation. Its agitation of the question of means to be devised for facilitating the disposition of cases falling under the jurisdiction of the United States Supreme Court, was strongly instrumental in effecting the establishment of the United States Court of Appeals. Among the commissions, that which directs its efforts to the subject of Uniform State Laws and of which Hon. Sullivan M. Cutcheon of Detroit is President, is especially energetic and progressive. This commission has begun a vigorous campaign for uniform commercial code similar to that now in operation in England, and which has proven a boon in point of facility and utility. The address of President James C. Carter was a masterly effort, presenting in a scholarly and comprehensive manner a review of what has been accomplished by congress and the legislatures of the different states. The annual address delivered by United States Circuit Judge Taft, was marked by its depth of thought and dignity of utterance. Interesting papers on "The Present Scope of the Constitutional Guarantees of Liberty and Private Property," were read by William Wirt Howe of Louisiana and by Richard Wayne Parker of New Jersey. The papers presented by Justice Brewer and Dr. Lyman Abbott were of unusual excellence and characterized by a remarkable rhetorical force as well as a rare flow of language.

Justice Brewer's radical views with reference to the abolishment of appeals in criminal cases probably gave rise to more agitated and vehement discussion than any other question raised during the convention. The officers for the ensuing year nominated by the grand council, and confirmed by the association, were as follows: President, Morefield Storey, of Massachussetts; Secretary, John Hinkley, Maryland; Treasurer, Francis Rawle, Pennsylvania; Executive Committee, George A. Mercer, Georgia; Alfred Hemingway, Massachussetts; Charles Claflin Allen, Missouri. The selections for Vice-Presidents and members of the local council of the various states, were made by the grand council. Two hundred and thirty-six new members were received into the association.

# *LEGAL MISCELLANY.*

A peculiar will, made by Nelson Connor, was recently filed in Washington. In it the testator leaves each member of his family one or more rooms in the house. His wife gets the two front rooms, the shop and the room over it. A daughter is left the dining-room and one room on the third floor. The back room upstairs and the kitchen are given to a grandson. Connor expresses a wish that all live together in peace and love. The lawyers say that while the will is one of the strangest on record it will hold.

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A blacksmith of a village in Spain murdered a man, and was condemned to be hanged. The chief peasants of the place joined together and begged the Alcade that the blacksmith might not suffer because he was necessary to the place, which could not do without a blacksmith to shoe horses, mend wheels and such offices. But the Alcade said, "How then can I carry out the law?" A laborer answered, "Sir, there are two lawyers in the village, and for so small a place one is enough! you may hang the other."—*Chicago Law Journal.*

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MUTILATING RECORDS—DISBARRING ATTORNEYS.—The *American Lawyer* for August well says: "The Supreme Court of Missouri, by its decisive action in permanently disbarring Messrs. Harber and Knight, of Trenton, in that State, for mutilating court records, and other sharp practices, in the defense of a client, has rendered the profession at large a great service. Ability, wealth, and eminence are thereby shown to secure no indulgence to men who prostitute to base uses the high privilege of ministering in courts of justice. Attorney-General R. T. Walker deserves commendation for having prosecuted these cases, as we insisted should be done in our issue of September last, 'to the bitter end.'"

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The introduction of clever trickery into photography will doubtless go far toward destroying the confidence in photogrophs as secondary evidence. It will be recalled that in the early days of the art the courts were seriously averse to admitting photographs, and this because of the original difficulty of securing really good likenesses of the scene or person exposed to the apparatus. But as the art progressed and perfection was more closely approached, the courts relaxed their rules so that it is no longer a legal question as to admitting photographs in evidence upon complimentary proof of the correctness of the view, etc. But recent discoveries as to the manipulation of negatives

and print paper so that pictures apparently natural though absolutely false may be made, will nearly destroy confidence entirely in the value of photographs as evidence. Given a corrupt motive, a venal photographer and an unconscionable party, and there is no end to the amount of false testimony that may be manufactured. It is a well known trick to photograph the head of one person onto the body of another by a clever manipulation of negatives, single and composite. We recall a case in New York wherein a photographer had succeeded in producing composite photographs of noted society ladies in Black Crook costume the faces being true miniatures, and the whole appearing genuine "spirit" photographs—where a ghost-like image is introduced as the spirit of a departed friend, or relative, into a picture are a common fraud. The clever trick of taking back front and side views of a person with but one exposure to the camera is practiced. In fact there is no end to the tricks that may now be performed by the aid of photography, and it would be useless to point out more of them. Suffice it to say that to any person who has seen the various kinds of skillful deceptions practiced in photography and who learns that there is practically no limit to the combinations that are possible, it seems that the value of photographs as evidence must greatly depreciate. As an original proposition the camera spoke with verity. Salem Scudder in "The Octoroon" is made to say "the apparatus can't lie." At any rate, like figures, the apparatus may be manipulated to lie. So that unless photographs be identified and proved by abundant and thoroughly credible evidence, they will not have much weight hereafter with persons who have seen some of the latest possibilities of the art.—*Correspondence, Central Law Journal.*

# *RECENT MICHIGAN DECISIONS.*

APPEAL FROM JUDGMENT ONLY—REVIEW—CROSS-EXAMINATION—REAL ESTATE AGENT—ACTION FOR COMMISSION—EVIDENCE.—An appeal from a judgment only, that is entered before a new trial is applied for, presents for review errors of law brought to this court by a proper bill of exceptions.

2. It is within the sound discretion of a trial court to allow any question to be asked on redirect examination that was proper and admissible on the examination in chief.

3. In a suit by real-estate brokers to recover a commission which it is claimed defendant contracted to pay upon the sale of certain real property, one of the plaintiffs testified that on the 10th day of October, 1889, he sold the property, and the defendant orally agreed to pay the firm of which he was a member a commission of $150 if the sale was consummated. On the redirect examination of the defendant his counsel offered to prove by the witness that the sale was never consummated; that plaintiffs were never authorized to sell the property, and never had anything to do with a sale of the same. This offer was denied, and, upon the ground that a question relating thereto was incompetant, irrelevant, and immaterial, an objection was sustained. *Held*, error.

## *CURRENT LITERATURE.*

*The Atlantic Monthly* for September contains in addition to the series, stories now running an interesting description of a recent visit to the battlefield of Chickamauga. Several other interesting articles appear in the number, among them a good criticism of the new Standard dictionary.

The September number of *The American Magazine of Civics* contains the second paper of Joshua Douglass on "Bimetallism and Currency." "The New Factor in Government," by James A. Collins, contains a novel suggestion as a defense against the evils resulting from industrial combinations. The article is an interesting one and the scheme suggested is to have the various industries represented in the legislative bodies. "Blind Partisanship"; "The Abolition of Poverty"; "About Production"; "The Political Mission of Reform"; "The Adopted Home of the Hun; A Social Study in Pennsylvania," and "Is Prosperity in Sight" make up a very interesting number.

# MICHIGAN LAW JOURNAL.

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## *MANDAMUS TO THE GOVERNOR.*

E. F. JOHNSON.

Will the Writ of Mandamus lie against the executive officer of a state to coerce the performance of a particular duty arising either out of his official position or imposed upon him by law?

This is by no means a new question. The first discussion we find in the books was that by Chief Justice Marshall in the case of *Marbury* v. *Madison* (*1803*), (*1 Cranch 138*). Since which time it has been discussed by the highest courts of record in twenty-seven states of the United States, some answering it in the affirmative and some denying the remedy.

The remedy by mandamus is of very ancient origin. Its original use, says Lord Mansfield was "to prevent disorder from a failure of justice and a defect of police", *Rex* v. *Barker*, *Burr.*, *1267*. It was not originally a judicial writ. It was called a high prerogative writ, (*Blk. Com. 110*) from the fact that it was used by the King in directing the performance of *any* desired act on the part of his subjects. It is now purely a judicial remedy and so recognized by statute in all the states.

It is the general rule or principle of law that mandamus will lie where there is no other adequate, specific legal remedy. If there be a right and no other specific legal remedy, this should not be denied.

Under a system of government such as exists in the states of the United States, where the entire function of government is vested in three separate and distinct departments, the executive, judicial and legislative, each co-ordinate in authority with the other and supreme in authority in respect to powers relating to and peculiar to the particular department, it is argued that one department should not be permitted to interfere with the other in the adminis-

tration of the duties of that branch of the government.

Mr. Merrill in his valuable work on mandamus says "The governors of the various states occupy a position similar to that of the president of the United States, being the heads of the executive departments of their respective states, and the constitutions of the various states generally specifically state (which the United States constitution does not) that the legislative, judicial and executive departments shall be distinct and independent of each other, and that the officers of one department shall execute none of the duties of either of the other departments."

The constitution of Michigan, Art. III., provides that "the powers of government are divided into three departments, the legislative, executive and judicial. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

The constitution of California, Art. III., provides that "the powers of government of the state of California shall be divided into three separate departments—the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others except as in this constitution expressly directed or permitted."

These are substantially the provisions which are contained in the constitutions of all the states. By these provisions the executive of a state is made one of the co-ordinate branches of the government and within the sphere of his constitutional powers is free and independent of either the legislative or judicial branches. He is by the constitution invested with certain political powers and with important governmental duties, in the control and performance of which he must necessarily be trusted and left to his own judgment and discretion. In the performance of these political governmental duties by the governor it is agreed by all, that the courts possess no power to supervise or control him in the manner of their discharge or exercise. But with reference to duties imposed upon the executive which are termed ministerial, there is much conflict of authority upon the question proposed as the subject of this paper. Not only is there much apparent conflict in the reported cases, but the text-writers do not entirely agree whether the courts possess the power or jurisdiction to control the action of the governor in any particular case.

Mr. Moses, one of the earliest writers upon mandamus, after

a very elaborate discussion of the question, reaches the conclusion that the better doctrine is, that he may be compelled by mandamus, to perform a duty clearly defined and enjoined by law, and which is merely ministerial in its nature and neither involves any discretion nor leaves any alternative. *Moses on Mandamus, pp. 80, 82.*

Mr. Wood, in his work on mandamus, however reaches directly the opposite conclusion, and maintains that an attempt on the part of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their powers, but is also attended with great danger. He says "If the courts may interfere with the discharge of any ministerial duties of the executive department of the government, they may interfere with all, and we should have the singular spectacle of a government run by the courts instead of the officers provided by the constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and laws made in persuance thereof. *Wood on Mandamus, (2nd Ed.) 88.*

While Dr. J. L. High, in his excellent treatise on mandamus, upon this branch of the subject says "That it may be conceded that the doctrine of the cases referred to in the previous section allowing mandamus to the chief executive officer of the state as to the performance of purely ministerial duties, has much to commend it in the very strong reasoning adduced by the different courts in its favor, yet the weight of authority is clearly opposed to the doctrine. . . In support of this doctrine, the courts adopting it have relied largely upon the three-fold divisions of the powers of government which prevails in this country, and upon the necessity of maintaining the perfect independence of the executive, legislative and judicial departments". *High on Extraordinary Legal Remedies; Spelling on Extraordinary Relief.*

Mr. Merrill in discussing this same question admits that the weight of authority is evidently in favor of the proposition that the writ of mandamus will never lie from a state court to the governor of a state, but he says "such a proposition can hardly be considered to be established on the ground of constitutional prohibition, and it will be perceived, when we consider the right of the courts to issue this writ to the heads of the various branches of the executive

department that the constitutional inhibition is maintained in only two of the states." He says "It seems to be impossible to preserve an isolation between the three departments." (*Merrill on Mandamus, Sec. 97.*

Prof. Mechem in his valuable treatise on the law of Public Offices and Officers, after a discussion of the rule that mandamus will not lie against the governor says "But on the other hand, it is held by a large number of cases, *if not by the weight of authority*, that where a particular duty of a merely ministerial character is imposed upon the governor, the performance may be enforced by mandamus in the same manner as against any other public officer". Public Offices and Officers, by Mechem, sec. 956.

The chief argument employed by the judges who deny the power of the courts to issue mandamus against the governor of a state in any case is, that each department of the government is by the constitution created free and independent of the other. Judge Cooley, in the case of *Sutherland* v. *The Governor, 29 Mich. 320, 324* which is cited as the leading case supporting this doctrine says "our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This decision is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties".

But can it be said that these departments are absolutely independent of each other? Does the fact that the constitution has allotted to each department the performance of certain particular duties, place either department above the law and give it a license to disregard the rights of individuals at its own pleasure? The courts are constantly restraining and directing the action of the executive officers through interpretation of the laws, and frequently nullifying the action of the governor, which is practically an interference with that department. The judiciary also interferes with the action of the officers of the legislative department by compelling them to perform certain purely ministerial duties. *State* v. *Moffatt*,

*5 Ohio St. 358; ex-parte Picket, 24 Ala. 91; Goff* v. *Wilson 32 W. Va. 393; State* v. *Boyd, 31 Neb. 682.*

The legislature can pass such laws as it may judge expedient, subject only to the prohibition of the constitution. If it oversteps the limit fixed by the constitution, the judiciary will interfere and set aside its legislation and protect the rights it has assailed, and the judgment of the courts, in those matters, can only be controlled by its intelligence and conscience. Can it be said that the governor can disregard his constitutional duties with impunity, thereby sacrificing the rights of private citizens without affording them any remedy except the long and tedious and uncertain remedy by impeachment? Can it be said that the constitution is a limitation upon the powers of the Governor if there is no power or authority within the state, capable of enforcing such limitation?

Neither is the judiciary independent of the legislature. The legislature fixes the places where the courts shall be held, determines the number of their terms, where the judges shall reside, and in the regulation of proceedings in civil and criminal cases, provides the manner in which suits shall be brought, prosecutions conducted, appeals taken, and all the vast machinery by which rights are asserted and wrongs redressed. The courts in the exercise of the functions of their department of government may decide that a certain individual, for a violation of the law, shall be punished in a particular way, by death or imprisonment, for instance, and the Governor may at once grant him a pardon.

What is meant by the various constitutional provisions that "the powers of government shall be divided into three separate departments, and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others," is, that the governor, for example, shall not at the same time be a judge or member of the legislature. Judge Story has written upon this question and said: "When we speak of a separation of the three great departments of government and maintain that, that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence the one upon the other in the slightest degree. *The true meaning is*, he says, that the whole power of one of those departments shall not be exercised by the same hands which possess the whole power of either of the other departments;

and that such exercise of the whole would subvert the principles of a free government." *Story on the Constitution; 1 Vol., Sec. 525.*

Field, C. J., now of the supreme court of the United States, in the case of *McCauley* v. *Brooks*, in speaking of this constitutional provision said: "There is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. It simply provides that there shall be *separate* departments and it is only in a restricted sense that they are independent of each other. *There is no such thing as absolute independence.* Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion, where rights have been vested under the constitution, or by existing laws". *16 Cal. 11, 39.*

Bartley, C. J. in the leading case of *State* v. *The Governor* in discussing this proposition said, "It is claimed, on the part of the defense, that inasmuch as the government is by the constitution divided into three separate and co-ordinate departments, the legislative, the executive, and the judicial, and inasmuch as each department has the right to judge of the constitution and laws for itself, and each officer is responsible for an abuse or usurpation in the mode pointed out in the constitution, it necessarily follows that each department must be supreme within the scope of its powers, and neither subject to the control of the other for the manner in which it performs, nor its *failure* to perform, either its legal or constitutional duties. This argument is founded upon theory rather than reality. That each of these co-ordinate departments has duties to perform in which it is not subject to the controlling or directing authority of either of the others, must be conceded. *But this dependence arises not from the grade of the officer performing the duties but the nature of the authority exercised.* Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests—"all paying its homage the least as feeling its care", and the greatest as not exempt from its power". And it is only where the law has authorized it, that the restraining power of one of these co-ordinate departments can be brought to operate as a check upon one of the others. . . . The constitutional provision declaring that "the supreme executive power of this state shall be vested in the governor" clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which his

determinations are conclusive. But there is nothing in the nature of the chief executive office of this state which would prevent the proper authority from enjoining the performance of some duties *merely ministerial* upon the governor. While the authority of the governor is *supreme* in the exercise of his political and executive functions which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is *supreme* in the determinations of all legal questions involved in any matter judicially brought before it. . . . However, therefore the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power. *Yet in regard to a mere ministerial duty enjoined on him* by statute, which might have been devolved on another officer of the state and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus." (*5 Ohio, St. 528*).

Marshall, C. J., said: "It is not by the office of a person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* v. *Madison, 1 Cranch 138*. This is the rule in all cases as applied by all the courts unless they are required to make an exception in favor of the governor. In all other cases it is not the rank or character of the individual officer, but the nature of the thing to be done, which governs. "No other officer is above the law; and every other officer, to whatever department he may belong may be compelled to perform a purely *ministerial duty*". Under the system of government such as exists in the states of the United States, men are controlled in their public and private relations, as well as in official stations, by law and not by the will of one man or by any body of men. Of course men in official stations are vested with a discretion in the performance of certain official duties, and in the performance of these political official discretionary duties, the courts all agree that they have no power to interfere except to compel a performance. Can it be truly said that any citizen by reason of official position, under a government such as exists here can claim that he is above the law? Or that duties, purely ministerial, may be legally imposed upon him, which he can perform or not at his own pleasure, without regard to the rights of his fellow men? Is it doubted that the legislative department may impose certain ministerial duties upon any officer under the laws of the

state? Suppose the state was possessed of a large tract of swamp or waste land which by an act of the legislature it offered to deed to any person or corporation, who should within a specified time, expend a large sum of money and a certain time upon such land towards redeeming it; and further that upon a certificate, of the State Auditor that some person or corporation had made such improvements and had expended the required amount of time and money as required by the statute, upon said land—the governor should execute a deed to such person or corporation—can it be said that in this case there is anything in the constitution of any of the states which, in creating the different departments equal and independent, will prevent the courts from interfering and securing to the citizens of the state their just rights? It is the fundamental principle of the law of mandamus, that it will issue if there be no other adequate specific legal remedy; *Rex* v. *Barker 3 Burr. 1267*, and this seems to be the result of a view of all the cases on the subject.

It is undisputed that each department is equal, co-ordinate and independent of the others in the performance of all purely discretionary political duties. And what is meant by purely political duties, are all those duties which are imposed upon each separate department by virtue of the department and necessary to the proper administration of that branch of the government.

It may become necessary or convenient for the people, acting in their legislative capacity, to impose upon the respective departments, other duties, which are not political and not necessary to a proper administration of the government, for the benefit of the whole people, but which are simply intended for the welfare, and convenience or advantage of individuals. Can it be said that all duties of whatever nature become political simply because the governor of a state is designated as the particular person to perform the same? Is it to be supposed that he is above the law while acting in that capacity? Is he not amenable to the law, both the civil and criminal? May not the judiciary of the state punish him for a violation of the criminal law just the same as a private citizen? May not the courts call upon him to attend a trial as a witness and give testimony; and if so, then have they not the further power to imprison him for contempt if he disobeys? The courts may also pass upon the validity of the governor's acts and those too of a political nature and pronounce them null and void; *State* v. *Ford County, 12 Kas. 441; Mauran, Adjutant General, etc.* v. *Governor, 8 R.*

*I. 192 at 221.* And so also may not the legislative department of the government interfere with the executive department in prescribing law for the purpose of directing his action? Not only may the legislature direct the governor's action by laws properly enacted, but it may actually remove him from office and thereby deprive him of all political power.

But it is argued that if the governor should oppose the order or direction of either of the other departments it cannot be enforced; for it is said that he has the entire control of the militia. Is this the only argument against the rule contended for? Are the courts to anticipate that the governor may not perform his duties? Should not the courts rather presume that when a controversy is determined by the courts—the only tribunals authorized by the constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination—the governor, as the chief executive officer of the state, whose peculiar duty it is to enforce the laws, would see that such determination should be carried into full effect? Lord Mansfield said "If there is no other remedy then this court is bound to interpose by the prerogative writ of mandamus; if the office be of consequence and value". *Rex* v. *University of Cambridge 1 Wm. Bl. 552.* In another case Lee, C. J. said: "where a man has *jus ad rem*, it would be absurd, ridiculous and a shame to the law, if he could have no remedy; and the only remedy he can have is by mandamus". *Rex* v. *Montecute 1 Wm. Bl. 64.* We do not believe that, when the legislature has imposed upon the governor certain duties, upon the performance of which the rights of individuals depend and has directed him peremptorily to perform them, and where no discretion is involved in such performance that he can relieve himself of this responsibility under the cloak of office.

In the case of *Ferguson* v. *Earl of Kinnoul*, Lord Brougham uses the following language: "But where the law neither confers judicial power nor any discretion at all, but requires certain things to be done, everybody whatever be its name, and whatever other functions of a judicial or of a discretionary nature, it may have, is bound to obey" *9 Clark & Fin. 290.*

Many cases cited for the purpose of supporting the rule that the judicial cannot control the ministerial acts of the executive, are not applicable for no such question was involved and if so, many of them where the writ was denied, might have been decided upon the general rule applicable to all public officers, that is where the officer has a right to exercise his discretion in the performance.

The case of *Sutherland* v. *The Governor, 29 Mich. 320.*, which is cited as the leading case sustaining the rule that the courts have no jurisdiction, was an application for a writ of mandamus to compel the governor to issue a certain certificate *when he should be satisfied* that certain work had been done in conformity with the law, giving him full power and discretion in the particular matter. And we find in this case the following language which shows that the writ might have been denied upon the general rule: "If we concede that cases may be pointed out in which it is manifest that the *governor is left to no discretion, the present is certainly not among them*, for here, by the law, he is required to judge on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department".

The case of *Mauran, Adjutant General etc.* v. *The Governor, 8 R. I. 192, 219*, which is cited for the purpose of sustaining the same rule, was a case in which the Adjutant General sought a mandamus against the governor commanding him to show cause why a peremptory writ of mandamus should not issue, requiring him to release the petitioner from arrest, or to inform said petitioner of the cause of the revocation of his commission of Adjutant General and to see that charges are duly preferred against him, and a court martial convened to try the same. After a full discussion of the two kinds of duties which the governor may be called upon to perform—political and ministerial,—the court said: But whether the distinction be valid or not, we deem it unnecessary to determine for the *duty* which we are here asked to enforce, though prescribed by the statute, *could not have been properly devolved on any one but the defendant.* It is a duty to see that charges are preferred against a military officer, and that court-martial is convened for his trial, . . . . and to confide such a duty to any one except the Commander-in-Chief would be an *extraordinary transgression of military usuage;* and in a time of actual service, might occasion the most embarassing, if not fatal disorders".

In the case of *The State* v. *Price, Governor, 1 Dutcher (N. J.) 331*, a writ of *mandamus* was sought to compel the governor to issue a commission to the relator, but there was no showing made that the relator had ever demanded such commission, or that the governor had ever refused the same, and the court held, "that the applicant, upon the facts disclosed, is not entitled to the relief sought for" and further held that the court was "asked to direct the commission to be issued in direct conflict with the plain requirements of the act" which of course could not be done. The existence of these facts were

sufficient grounds for denying the writ against *any* official.

In the case of the *Vicksburg Ry. Co.*, v. *The Governor*, *61 Miss. 102*, a writ of *mandamus was prayed* for only as against the state treasurer, and no relief was sought as against the governor. Campbell, C. J. said "There is no prayer for mandamus to the governor". A lengthy discussion is given in this case, also upon the question whether the governor can be compelled by mandamus to perform any act, and is frequently cited to support the rule. In the case of *Jonesboro Turnpike Co.* v. *Brown, Governor, 8 Baxter, (Tenn.) 490*, there was an application to the judge of the circuit court, for mandamus to compel the governor to issue certain bonds of the state, which it was claimed the legislature, by certain acts, had directed to be issued. In rendering the opinion of the court, McFarland, J. said "The conclusion is reached that upon a proper construction of these acts, the petitioner is not entitled to any of the several series of bonds claimed". This argument would seem to be sufficient upon which to have based a refusal of the writ as against any other officer of the government.

In the case of *Low* v. *Towns, Governor, 8 Ga. 360*, which was an application on the part of Low, for a mandamus against the Governor, to show cause why he should not issue to him a commission as clerk of the Court of Ordinary of Henry County, the Governor responded simply denying the jurisdiction of the court to issue a mandamus against him and did not admit or deny the right or title of Low to the office which he claimed. Here the question was squarely raised, whether it might have been decided upon the ground that the relator had no right or title to the office claimed, does not appear from the report of the case. But in rendering the opinion of the court, Warner, J., used the following significant language: "This is a government of *law* and not of *men*, and the judiciary department of the government is the legitimate and appropriate department to investigate and decide upon the *vested rights of individuals*, when acquired under the constitution and laws of the land". And further "To withhold from the clerk, when legally appointed, his commission which the law entitles him to receive from the Governor, is not only a *violation of the law*, but of a *vested legal right*". . . . . If, as has already been remarked, it was competent for the Legislature to impose this ministerial duty of issuing a commission to a Clerk, on the executive officer of the government, wholly independent of, and in addition to the other functions devolved upon that officer by the Constitution, why may he not, when the

performance of this ministerial act, so required by law, is essential to the completion and enjoyment of individual rights, be considered, *quoad hoc*, not as an *executive*, but as a merely *ministerial* officer, and therefore, liable to be directed and compelled to perform the act by mandamus? Viewed as strictly a *legal* question, we cannot offer any satisfactory reason why he should not, according to the general principles of the law". The writ was denied upon political reasons alone.

Every department of the government has its secrets of state, or privileged communications, which it is not only the right of the officer to refuse to disclose, but his duty to withhold, *1 Greenl. on Evidence, sec. 250 251*, and this is the principle upon which the case of, *The appeal of Hartranft, Governor, 85 Pa. St. 433*, was decided rather than the constitutional reason that the three departments are created co-ordinate and independent. *Thompson* v. *The German Valley Ry. Co., 22 N. J. Eq. 111, where same principle was applied; Gray* v. *Pentland, 2 Ser. & R. 23; 1 Whart. Law of Ev. sec. 604; 3 Vol. p. 37 Burr's Trial; See dissenting opinion of Agnew in Appeal of Hartranft, 85 Pa. St. 433, at 455.*

In the case of *Bisbee Jr.* v. *The Governor, 17 Fla. 67.* which was an application to compel the governor to issue a certificate of election to the relator and which was decided by a divided court, we find the following language in the majority opinion: "Where the governor accepts an office which he may be entitled to exercise *ex-officio*, the latter is an inferior office, *not necessarily connected with* the Executive Department of the government. In this case he is liable to be controlled in his official action, not as the governor, but as the inferior officer into whose action no executive function enters. *In the present case the act required to be performed is not the act of such inferior officer, but it is the act of the Governor as Governor, in his political executive capacity.* This would seem to imply that there were *some* cases in that state where the writ might issue as against the Governor. In the opinion of Mr. Justiec Westcott dissenting, we find the following significant language: "*It is now, and has been since the time of Lord Mansfield, a function of the courts*, when a matter of private right is involved, *to control ministerial acts of executive officers.* It is in such a case a judicial function to determine what is aministerial act, and if the act be that of the governor, the Constitution makes no difference as to it".

In the case of *State ex rel. Bartley* v. *Governor 39 Mo. 388,*

which was an application for mandamus to compel the Governor to issue to the relator a certificate of election as one of the justices of the county court, within and for the County of Callaway, there were many objections to the sufficiency of the petition or application raised by demurrer, among which was the one that the court had no authority or jurisdiction to issue mandamus against the governor. In the opinion of the court we find the following language: "The Governor is bound to see that the laws are faithfully executed, and he has taken an oath to support the Constitution. In the correct and legitimate performance of his duty, he must inevitably have a *discretion* in regard to granting commissions. . . . . If he is denied the exercise of any discretion in such case, he is made the violator of the constitution, not its guardian". None of the courts coerce the performance of a particular duty where the performer may exercise a *discretion*, as against any officer, corporation or person, so it is seen that the courts in this case denied the writ upon the same ground upon which it would have been denied in any other case and consequently can not be considered a case supporting the rule that the Governor may not be compelled to perform *any* duty.

The states usually cited, as those in which the courts have refused to entertain jurisdiction to compel the Governor by mandamus to perform *any* particular duty, are, Arkansas (*Hawkins* v. *Governor, 1 Ark. 570*); Illinois (*People* v. *Bissell, 19 Ill. 229; People* v. *Yates, 40 Ill. 126; People* v. *Cullom, 100 Ill. 472*); Mississippi (*Vicksburg R. R. Co.* v. *Lowry, 61 Miss. 102; 48 Am. Rep. 76*); Missouri, (*State* v. *Governor, 39 Mo. 388; Railroad* v. *The Governor, 23 Mo. 353*); Michigan, (*Sutherland* v. *Governor, 29 Mich. 320; 18 Am. Rep. 89*); Maine, (*In re Dennett, 32 Me. 309*); Louisiana, (*State* v. *Warmouth, 22 La. An. 1; State* v. *Johnson, 28 La. An. 932; State* v. *Board of Liquidation, 42 La. An. 647*); Florida, (*State* v. *Drew, 17 Fla. 76*); Tennessee, (*Bates* v. *Taylor, 87 Tenn. 319; Turnpike Co.* v. *Brown, 8 Baxter, 490*); Rhode Island, (*Mauran* v. *Smith, 8 R. I., 192*); Minnesota, (*Chamberlain* v. *Sibley, 4 Minn. 228; Rice* v. *Austin, 19 Minn. 103; Western R. R. Co.* v. *DeGraff, 27 Minn. 1; State* v. *Whitcomb, 28 Minn. 50*); Georgia, (*Bonner* v. *State, 7 Ga., 473; Low* v. *Towns, 8 Ga., 360*); New Jersey, (*State* v. *Governor, 25 N. J. 331; State* v. *Price, Governor, 1 Dutch, N. J. 331*); Pennsylvania, (*Hartranft's Appeal, 85 Pa. St., 443; Commonwealth* v. *Wickersham, 90 Pa. St., 311*); Arizona Territory, (*Board of Directors* v. *Wolfley, 22 P. Rep. 383*); Indiana, (*Hovey* v. *State, 127 Ind., 588; Gray* v. *State, 72 Ind.,*

*567; Governor* v. *Nelson, 6 Ind. 496; Biddle* v. *Willard, 10 Ind. 62; Baker* v. *Kirk, 33 Ind. 517*); South Carolina, (*The State* v. *Champlin, 2 Bail., S. C., 220*); Texas, (*Houston &c. Co.* v. *Randolph, 24 Tex. 317*).

Among these states however, the courts of Missouri, Minnesota, Georgia, Indiana, Louisiana and Tennessee, have put themselves on record both for and against entertaining jurisdiction, while in Pennsylvania and Florida the rule was made by a divided court. So in determining the weight of authority from the arguments, it would seem unfair to say that one rule or the other was the settled policy in these states, and that the state should be counted one way rather than the other.

On the other hand, states which may be cited as those which sustain the jurisdiction of the courts in granting the writ of mandamus against the Governor to coerce the performance of purely non-political ministerial duties, are Ohio, (*State* v. *Chase, Governor, 5 Ohio St. 528; State* v. *Moffitt, 5 Ohio, 358*); California, (*The People* v. *McCauley, 16 Cal. 11; Middliton* v. *Low, 30 Cal., 596*; *Harpending* v. *Haight, 39 Cal. 189; Hatch* v. *Stoneman, 66 Cal. 632*); Kansas, (*Martin, Governor,* v. *Ingham, 38 Kan. 641; The State* v. *Comm'rs &c., 12 Kan. 441*); Alabama, [*Tennessee &c. R. Co.* v. *Moore, 36 Ala. 371; Chisholm* v. *McGehee, 41 Ala. 192*]; Colorado, (*Greenwood Cemetery &c. Co.* v. *Routt, Governor, 17 Colo., 156; 28 Pac. Rep., 1125; Union Colony* v. *Elliott, 5 Colo., 373; People ex rel. Rucker* v. *Dist. Court, 14 Colo., 396; People ex rel. Rosenfield* v. *Dist. Court, 16 Colo., 342*); North Carolina, (*Cotten* v. *Ellis, 7 Jones, N. C., 545*); Maryland, (*Magruder* v. *Swann, 25 Md., 173; Groome* v. *Gwinn, 43 Md., 572; Miles* v. *Bradford, 22 Md., 172*); Montana, (*Chumasero* v. *Potts, 2 Mont., 242*); Nevada, (*State* v. *Blasdel, 4 Nev., 241*). To this list of states might be added those states in which the question has been decided both ways, Indiana, (*Gray* v. *State, 72 Ind., 567, Baker*); Missouri, (*Pacific Railroad* v. *The Governor, 23 Mo., 353, 358*); Minnesota, (*Chamberlain* v. *Sibley, 4 Minn., 228; Minn. etc. Ry. Co.* v. *Sibley, 2 Minn., 1*); Georgia, (*Bonner* v. *The State, 7 Ga., 473, at 481;* where Warner, J., says: "In England, it is true, the law ascribes to the King, in his political capacity, absolute *perfection*—the maxim there is, that "the King can do no wrong"; but that maxim is not applicable to the Chief Magistrate of a republican state. The right of sovereignty here is in the people, and not in the executive authority of the state. All the power and authority of the executive officer of the state, is derived from the people—they have by their constitution and laws, delegated it to him, and defined his duties. Every officer

from the highest to the lowest, in our government, is amenable to the laws of his country, for an injury done to individuals, either by a violation of them, by acts of commission, or *refusing to do that which the laws enjoin upon him as a duty.* When the voice of the people is in the form of a legislative enactment, *all* are bound to obey the mandate"; *Low* v. *The Governor, 8 Ga. 360.*) Tennessee, (*The State ex rel.* v. *Board of Inspectors and the Governor, 6 Lea, Tenn. at 21; Turnpike Co.* v. *Brown, 8 Baxter Tenn. 490*; *Bates* v. *Taylor, 87 Tenn. 319*) Louisana, (*Hope* v. *Board of Liquidation, 42 La. Ann. 647; 41 La. Ann. 647; 41 La. Ann. 535; Oliver* v. *Warmouth, Governor, 22 La. Ann. 1.*)

The *current* of authority seems to be in favor of the rule which denies the jurisdiction of the courts over the Governor in *any* case; but if we subtract from the number of states, where this rule has been given, those states which have enforced both rules and also those* where the question was not squarely raised, but might have been decided upon the general principle relating to mandamus, then the weight of authority will clearly appear to be in favor of giving the courts jurisdiction over the Governor to coerce the performance of purely non-political ministerial duties.

Under our system of Government no *officer, however high is above the law*, and has no prerogatives, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, specific, speedy and adequate remedy, he can be required to perform those duties by the compulsory process of *mandamus.* It is maintained that, under a republican form of government, individual rights and privileges are sub-ordinate only to the public welfare and necessity, and that a remedy is always provided for the infringment of private rights. Governments established by men have not yet reached that stage of perfection where perfect and equal justice are afforded to all; but it is believed that, in the evolution of government and of the idea of the equality of *all* men before the law, without reference to position or official station, written *law* will supplant the unwritten prerogative of Kings.

*New Jersey. Michigan, Mississippi, Tennessee, Rhode Island, Georgia, Pennsylvania and Florida.

# *DIVERSITY OF LAWS GOVERNING NEGOTIABLE PAPER.**

N. A. FLETCHER.

The very respectable and able body that held its annual meeting in this city last month, the American Bar Association, has for a number of years devoted much of its energy to an endeavor to secure uniformity in the laws of the several states governing negotiable paper, bills of lading, the forms for the acknowledgment and certification of deeds, divorce and a number of other subjects in which such uniformity is without doubt very desirable. It has, however, made but little progress, and the nature of the task it has undertaken is such that it does not seem possible that it will ever be able to accomplish much.

Jurisdiction over the subjects I have referred to is, under the Constitution of the United States, reserved to the states, and all legislation tending to make the law on these subjects uniform must, until the Constitution is amended, be adopted by the states. The American Bar Association, accepting the situation, are endeavoring to have the legislatures of the several states pass acts of precisely similar terms codifying the law of these subjects. Any one who is familiar with the methods of state legislation must recognize the impossibility of getting forty-four state legislatures of the union to adopt a uniform law on any subject; but it is also essential to this plan that the law in each state, after being adopted shall be left untouched so that it will remain uniform. The state legislatures are in a great part made up of men who not only will not act on the suggestion of professional men, or bankers, but who also have opinions of their own about what the law on any of these subjects should be, and they are not willing to forego their opinions in deference to any desire for uniformity throughout the states. At the last session of our own legislature a bill was introduced abolishing days of grace on commercial paper. It passed the house but failed in the senate. This is a simple change and should have been made unhesitatingly, but the estimable gentlemen who had the matter in hand could not

*A paper read before the Michigan Bankers' Association et its recent meeting held at Detroit.

get it enacted into a law. When so much difficulty is found in getting so trifling a change made in the law, it requires no great amount of reflection to convince one that it would be impossible to get the Michigan legislature to make all the changes which would be necessary if the laws of the several states are to be uniform. The same difficulty would be found in the other states, and I am strongly of the opinion that the gentlemen who have engaged in the work of bringing about uniformity through the co-operation of the various state legislatures have a hopeless task on their hands.

On the other hand there are those who argue that the inconvenience which arises from the diversity of state laws on these subjects must be borne until the people become convinced that the time has arrived when the growth of the country, the increase of its population, the development of its commerce and its perfected facilities of communication—facilities which have for purposes of business brought San Francisco as near to New York as Philadelphia was when our National Constitution was adopted—have so completely changed the conditions under which we do business that it is as important now that the regulation of these subjects should be committed to the federal government as it is that it should have control of the subject of interstate commerce.

It is not easy for anyone who is not familiar with the reports of the decisions of the Supreme Court of the United States to conceive the great benefit which the country has derived from that clause of the National Constitution which gave to the national government control of the subject of commerce between the several states, or to fully understand that if that power had not been lodged in Congress the great transcontinental lines of transportation which have commercially unified the states could have never been built up. These reports show plainly that the railroads would have been so harrassed by unreasonable restrictions and burdens imposed by state legislatures that their operation as a whole would have been impossible. No one who does not examine them can form an adequate idea of the amount of time the United States Supreme Court has devoted to the examination and overthrow of state legislation which was adopted for the purpose of promoting local interests by imposing restrictions and burdens on citizens of other states doing business within the state.

So far as commerce itself is concerned, we are protected by the interstate commerce clause of the Constitution from any such diversity of state laws as would seriously restrict it.

Negotiable paper is such an important incident of interstate commerce that it may almost be said to be a part of it; but it is generally conceded that the power given to Congress by the interstate commerce clause does not include a right to legislate upon the rights and liabilities of parties to negotiable paper given in interstate commercial transactions.

Such paper has become the subject of an interstate commerce of great magnitude. The transactions in it amount every year to hundreds, perhaps thousands of millions of dollars. This commerce has become so general and extended and diversified that state lines have been entirely lost sight of in the actual transactions, and attention is only directed to them when paper of this class is not paid, and a question arises as to the rights of the holder or the liabilities of the parties to it or the conditions necessary to fix those liabilities. It is quite difficult for a banker to familiarize himself with the law of his own state governing commercial paper; it is simply impossible that he should be familiar with the laws of the other states where the paper he discounts is payable or where it was made or where the liability of some of the parties to it was incurred. Some writers, therefore, who have given attention to the subject think that this branch of interstate commerce has now become so important that its regulation should be vested in Congress with a view to having it governed by one set of laws. They are naturally led to this view by the experience of the country in the general matter of interstate commerce to which I have referred.

But I do not think that the inconvenience that arises from the diversity of these laws is sufficient to justify a change in the National Constitution which would give Congress power over the subject. Such a change would be revolutionary in its character. The law of negotiable paper is a branch of the law of contracts and is so closely connected with the latter that it could not be separated from it. If Congress were given power over the subject of negotiable paper it would have to be given power over the subject of contracts generally, and the disadvantage of having the law of contracts made a subject of national concern would be so great as to outweigh the advantages that might arise from having the law regulating negotiable paper uniform throughout the country. Neither would it be possible to secure such a change in the Federal Constitution. The people of this country have always shown a wise conservatism on the subject of constitutional amendments and it would be as impossible to secure an amendment which would so completely alter the relation of the states to the union as it would be

to get the forty-four state legislatures to pass uniform laws on the subject of bills and notes and then leave them untouched until there was a common consent to their amendment.

It is my opinion, therefore, that there is no hope of securing uniformity of law governing commercial paper among the states of the union and, although that uniformity would for many reasons be desirable, I think that you, as bankers, will say that your experience has not shown that the difficulties of the present condition are so great that other important interests should be sacrificed to secure it, if it could be secured.

I do not know whether it was intended when this subject was assigned to me that I should write a paper in which I would point out all the diversities that exist in the laws of the states governing commercial paper, but if it was I cannot undertake it, because it would take a volume to cover the ground. However, for the purpose of trying to show that no serious inconvenience arises from the diversity of state laws on the subject, I will call your attention to some diversities that exist, and I venture to say that hardly any banker who is present, in appealing to his own experience, will be able to call to mind any great inconvenience he has ever suffered from these differences in the law.

Notwithstanding we often hear it said that the law is the perfection of reason, the reasoning of the law has not been so far perfected that the courts of the different states have been able to come to anything like unanimity of opinion upon the question of the liability of a third person endorsing a promissory note before its delivery to the payee. There is perhaps no other question in the law of commercial paper on which the courts have expressed so many different opinions. If John Smith makes a note payable to the order of James Jones, cashier, and Thomas Brown endorses it before its delivery to the bank, the courts of Michigan hold that Brown is a joint maker; but in some states he is held only to the liability of a guarantor; in still others it is held that his liability is prima facie that of the first endorser; in still other that, while his liability is that of an endorser, he is a second and not a first endorser; and in still others that he is not presumed to be either a joint maker, a guarantor, or a first or second endorser, but that the blank endorsement implies that the party making it intended that the payee should have the right to choose in what capacity he would hold him liable. Which one of you ever got into difficulty in taking such a note, even though it was made in another state or made

payable in another state in which a different opinion of the liability of the third person is held from that which our supreme court has announced? If it is payable in a state in which the third party is held to the liability of an endorser it is sent to that state for collection and the banker to whom it is sent, acting upon the law of his own state, protests it if it is not paid. I doubt whether there is one of you who would hesitate to discount a note with such an anomalous endorsement upon it simply because it had been made or was made payable in another state.

In Illinois a verbal acceptanee of a draft is sufficient, but, in Michigan an acceptance must be in writing. But an Illinois banker who discounts drafts on parties in Michignn sends them to Michigan for presentation, and those Michigan banks insist on a written acceptance. On the other hand, a Michigan banker buying drafts from his customers on parties in Illinois sends them to his Illinois correspondent for collection and that correspondent complies with the law of Illinois in relation to acceptance. No difficulty arises from this difference.

Treating the verbal acceptance of a draft as sufficient is not the only peculiarity of the Illinois law governing commercial paper. Every one who has seen notes which are handled by the banks of Chicago, must have been struck with the fact that the name of the payee is written on the back twice instead of once only as in other states. The first endorsement is for the purpose of making a transfer of title to the paper. The second is made further down in order that a guarantee of payment may be written or stamped over it. In other words, the bankers of Illinois do not, as a rule, rely upon endorsements. but insist upon guaranties. The reason for this is that by the law of Illinois an endorser cannot be sued until after the holder of the paper has sued the maker, obtained a judgment, and used due diligence to collect the money from him. Having done this, he may then sue the endorser. But if he fails to begin his suit against the maker so as to get the case in court at the first term after the paper matures, he loses his right against the endorser entirely.

In other states, perhaps in nearly every other state in the union a bank may sue the endorser immediately after the paper matures without bringing any suit against the maker at all, and in nearly all states he may join the maker and endorser in one suit. The difficulty of enforcing the liability of an endorser in Illinois is, for the reasons I have given, so great that the bankers of that state, as

a rule, require guaranties. They can sue the guarantor as soon as the paper is past due, can join him and the maker in one suit, and they do not lose their rights against the guarantor by not suing the maker at the first term of court after the paper matures. These peculiarities of the law of Illinois cause no inconvenience to the people of that state because they conduct their business in conformity to them; neither do they cause any appreciable inconvenience to the citizens of other states. It is safe to say that the bankers in this room have handled many hundreds of thousands of dollars of paper payable in Illinois and have never suffered any loss by reason of unacquaintance with these peculiarities of Illinois law. I believe some of them were removed by an act passed at the last session of the legislature of that state.

There is perhaps no branch of the law of contracts in which there is a greater diversity than in the liability of married women. In some states a married woman can make herself liable in every way that a single woman or a man can. In other states she cannot make herself personally liable for the debts of another but may make such debts a lien upon her property. In still others, while she cannot make herself liable generally, she can, without executing a mortgage, so make the obligation a charge upon her property that it can be enforced against it. Bankers perhaps run as much or more risk from this diversity than from any other and it would be a great advantage to the business world if married women were in all states allowed to contract on precisely the same terms as single women or as men. It is especially desirable that they should be enabled to do so on commercial paper which is so likely to go beyond the bounds of the state in which it is made, and be presented for sale or discount to persons who can know nothing about the liabilities of the parties to it without looking up particularly the law of the state in which the contract was made. There is, however, a tendency toward removing all restrictions upon the powers of married women to contract and we may well hope that it will not be long before they are entirely done away with. But of this, as of other diversities of which I have spoken, it may be said that bankers do not find any serious difficulty on account of it.

It would seem to anyone who looked at the question from a purely business standpoint that if a banker held a note which he feared was not good and could get his debtor to leave a note of a third person as collateral, he would have the same rights in the collateral note as if he had actually bought it. The courts of New

York state, however, hold that in taking a note as collateral security to an antecedent indebtedness the banker does not become an innocent holder, and that the persons whose names are on the collateral note may make any defense to it which they could have made in the hands of the party to whom they originally gave it as, for instance, that it was obtained by fraud or that it was given without consideration. In most other states the courts hold that anyone who takes a note or other negotiable paper as collateral security for an antecedent indebtedness has the same rights against the persons whose names are on it as if he had bought it for value before maturity. In discussing the diversity of state laws governing negotiable paper this peculiarity of the law of New York is generally referred to as an instance of one of the incongruities that could be done away with if we could get legislation making the laws of this subject uniform. I have not been able to see that this is a matter which interests the people of other states. Business is conducted in New York in conformity to the rule and there is little probability that citizens of other states will be at all effected by it.

I have now called your attention to a few and only a very few of the diversities in the law of this subject. As I have said already, it would require a volume to deal with all of them. Those to which I have referred are typical of the whole. I have not called your attention to them because I supposed you were not familiar with them, but simply to challenge your attention to them and appeal to your experience with a view of having you say whether, judging from that experience, they cause any serious difficulty in carrying on the business of discounting commercial paper. I believe that I may anticipate your answer. I do not believe that you have found that they do. But, even though they do not, it does not follow that uniformity of law on this subject is not desirable. Commerce is always benefited by simplifying the forms through which it must be conducted and by diminishing the chances of loss. If, however, the present inconveniences are not serious, if the advantages to be gained by a change are not substantial, this association ought not to devote its energies to an effort to effect a change. My own opinion is that so far as the law of commercial paper is concerned, there is not enough importance in the subject of uniformity to warrant this association, or any other body of men, in engaging in a struggle to have the legislatures of all the states uniformly codify the law on the subject, much less to warrant a change in the Constitution of the United States so that the subject can be dealt with by one legislature.

# MICHIGAN LAW JOURNAL.

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EDITORS: ALFRED J. DUCHARME.
METCALF B. HATCH.
GEORGE P PALMER.

## *NOTES.*

CAN A FEDERAL COURT RESTRAIN CRIMINAL PROCEEDINGS IN A STATE COURT?—The case of *Hutchinson's Adm'r* v. *Wytheville Ins. & Bank. Co.* in which the Circuit Court of the United States for the Western District of Virginia issued an injunction restraining the state of Virginia and its officers from criminally prosecuting one of its citizens for a violation of its laws, lends color to the complaints which are now so frequent that the Federal courts assume jurisdiction and exercise authority which are not rightfully theirs. In this case the plaintiff, a citizen of Iowa, filed a bill in the above court against the defendant corporation alleging that it was insolvent and asking for the appointment of a receiver. An account was ordered and the commissioner reported that in his opinion, H. G. Wadley, the president of the company, was guilty of fraud and that he held a large amount of the funds of the company in trust for it and its creditors. After these proceedings were had the grand jury of Wythe County found a true bill against H. G. Wadley for embezzling the assets of the company. He appeared before the court and pleaded not guilty. Shortly after he obtained an injunction from the Federal court restraining the prosecuting attorney of Wythe County and all others from prosecuting him further on the said indictment or in any way making use against him as evidence of the books, vouchers, or papers of the company. In his opinion denying the motion to dissolve the injunction the Federal judge contended that where a Federal court has once acquired jurisdiction over the affairs of an insolvent corporation, no officer of the corporation can be prosecuted in a state court for embezzling the funds of the company until the civil suit in the United States court be finally disposed of and the affairs of the company wound up. In support of this view the court used this language: "The court, first obtaining jurisdiction of the subject-matter and of the parties, has the right to retain exclusive control of the subject-matter and of the parties until it shall have finally disposed of the questions submitted". This is no doubt a correct statement of the law, but does it apply to

the circumstances of the case? The questions before the Federal court were the winding up of the affairs of the company and the civil liabilities of its president, it is hard to see how this includes the criminal liability of the president for a violation of the laws of the state of Virginia. This is equivalent to saying that a court having civil jurisdiction over the person and property of a litigant would also have jurisdiction to try him for burglary or any other criminal offense if it were in any way connected with the civil questions submitted to the court.

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POWER OF STATE TO RESTRICT NATURALIZATION.—In order to restrict in a measure the indiscriminate and precipitate grant of franchise to illiterate foreigners on the eve of an election the legislature of New Jersey enacted a statute, one of the provisions of which was vigorously attacked in an effort to establish its unconstitutionality. Prior to such enactment party committees in furtherance of their own ambitions and unconscientious ends, had been accustomed to procure the naturalization of large contingents of foreigners immediately preceding election. One provision of the new law prohibits party committees or candidates from the payment of fees of applicants for naturalization papers. The other provision upon which strong warfare has been waged, is to the effect that "No person shall hereafter be naturalized or admitted to be a citizen of the state within the next thirty days preceding any national, state, municipal, general, special, local or charter election". The opposition contended that the state could in no wise abridge the right of an applicant for citizenship to secure his papers at any time. However, the supreme court upheld the constitutionality of the statute. The opinion states: "It is entirely settled that no state can pass naturalization laws. The United States statute provides for the naturalization of aliens by application to a Circuit or District Court of the United States, or a District Court or Supreme Court or court of record of any of the states having common law jurisdiction and a seal and clerk. The United States government has thus selected the state courts as one of its agencies to hear and act upon applications for naturalization. The solution of the controversy in this case turns upon the question whether the state may not regulate the order of business in its own courts in relation to this subject, or refuse altogether to permit its courts to entertain applications for naturalization. Whether the judges of the state courts shall act on applications for naturalization or execute any other like authority, with which they may be lawfully invested is exclusively within, and subject to the will of the legislative branch of the state government. The conclusion is that it is competent of the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and, therefore, it can lay any restraint, regulation, limitation, or condition upon the practice in such cases, which it may deem expedient or proper.

# LEGAL MISCELLANY.

On the 15th of January, 1895, two judgments were rendered by the Supreme Court of Canada sitting at Ottawa as follows: In the case of *The Municipal Council of the Corporation of South Norwich, Respondents* v. *W. Huson, Appellant,* which was an appeal from the decision of the Court of Appeals in Ontario, the court consisting of Sir Henry Strong, C. J., Fournier, Taschereau, Gwynne and Sedgwick, JJ., it was held, Gwynne and Sedgwick, JJ., dissenting: That the statute, 53 Vict. Cap. 56, §18, Ontario, allowing under certain conditions municipalities to pass by-law, for prohibiting the sale of spirituous liqnors is *intra vires* the Ontario Legislature, as is also §1, 54 Vic., which explains it,. but the prohibition can only extend to sale by retail.

The other case was a special case referred by the Governor General in Council to the Supreme Court, the following questions being submitted: 1. Has a provincial legislature jurisdiction to prohibit the sale of spirituous, fermented or other intoxicating liquors? 2. Or has the legislature such jurisdiction regarding such portions of the Province to which the Canada Temperance Act is not in operation? 3. Has a provincial legislature jurisdiction to prohibit the manufacture of such liquor within the province? 4. Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the Province? 5. If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail according to the definition of a sale by retail either in the Statutes in force in the province at the time of Confederation or any other definition thereof? 6. If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the 99th section of the Canada Temperance Act. (Revised Statutes of Canada, Cap. 106, §99 ?) 7. Had the Ontario legislature jurisdiction to enact the 18th Section of the Act framed by the legislature of Ontario in the 53rd year of Her Majesty's Reign and entitled: "An Act Respecting Local Option in the matter of Liquor selling?

The court composed yf Sir Henry Strong, C. J., Fournier, Gwynne, Sedgwick and King, J. J., stated its opinion to be to the effect that all the said questions so referred as aforesaid should be answered in the negative. The Chief Justfce and Justice Fournier dissenting from the opinion of the majority of the court were of the opinion that the said questions should be answered in the affirmative with the exception of the questions 3 and 4 which they were of opinion should be answered in the negative. Thus by the Court: A provincial legislature has not jurisdiction to prohibit the sale either by wholesale or retail within the Province of spirituous, fermented or other intoxicating liquors. By

the Chief Justice and Fournier, J.: A provincial legislature has jurisdiction to prohibit the sale within the Province of such liquors by retail but not by wholesale, and if any statutory definition of the term wholesale or retail be required legislation for such purpose is vested in the Dominion as appertaining to the regulation of trade and commerce. By the Court: A provincial legislature has not jurisdiction to prohibit the manufacture of liquors within or their importation into the province.

The Ontario Legislature had not jurisdiction to enact the 18th Sec., 53 Vic. Cap. 56, as explained by 54 Vic. Cap. 146. The Chief Justice and Fournier, J., dissenting.

It will be perceived that the Court thus gave two judgments, on the same day, the one directly contrary to the other.—*Correspondence, Alfred Russell.*

## *RECENT MICHIGAN DECISIONS.*

ADVERSE POSSESSION BETWEEN TENANTS IN COMMON.—Bill filed to obtain a partition of two portions of mill lot D, in the City of Grand Rapids. The lot in question lying on the east bank of Grand River, being divided into a north and south parcel by a bridge crossing the same from east to west. Defendants admit ownership as tenants in common with complaints as to that portion of the lot lying south, but claim absolute ownership by adverse possession, of that portion lying north. *Held*, That the character of the tenancy and occupancy, the acts done by the defendants and their predecessors in the erection of permanent improvements and the payment of taxes was sufficient to show such an open, continuous and exclusive possession as the law requires between tenants in common to create an absolute title by adverse possession in one as against the other. *Fuller v. Swensberg.* (Sept. 26.)

COMMISSION — AWARD BY ARBITRATORS—WHEN FINAL—REJECTION OF AWARD BY JURY.—A finding by arbitrators as to an account in dispute, in order to be final and conclusive upon the parties as to the sum to be paid, must either name the amount or furnish definite means by which it can be ascertained. When it appears from the testimony and the books of account that it was not possible to compute the award from the statements furnished, it was not error to submit to the jury the questions arising under the submission and award. The court having charged the jury that the fact of the giving of a chattel mortgage by one of the arbitrators to the defendant would not be sufficient, in itself, to set aside the award, the introduction of such mortgage could not be said to be prejudicial to the defendant. *Mather v. Day.* (Sept. 26.)

CORPORATIONS FAILURE OF FOREIGN CORPORATIONS TO COMPLY WITH SEC. 4161 HOW. STAT.—EMBEZZLEMENT BY AGENT.—CHARGE OF COURT.—1. The provisions of Section 4161 How. Stat., do not prohibit foreign corporations who have failed to comply with its terms from doing business within this state, as the expression of the intent to prohibit is neither clear nor positive. 2. Where one acts for and permits himself to be held out as the agent of a company receiving money from various persons willing to pay, he is a de facto agent, and it is not necessary in order to convict him of the crime of embezzlement that his relation should have grown out of a lawful contract of agency. 3. An allegation fixing the time of committing the offense as between two days is not fatal on the ground that the day was not alleged with certainty. 4. In a porsecution for the statutory offense of embezzlement evidence of previous acts of embezzlement are admissible to prove intent. 5. It is the duty of the jury to take the law from the court, and where there is no conflict in the evidence and the defendant admits facts legally constituting an offense, the court may so state.—*People v. Hawkins.* (Sept. 27.)

CRIMINAL LAW—ASSAULT WITH INTENT TO DO GREAT BODILY HARM—INTENT—EVIDENCE.—1. Where one assaults another with a deadly weapon with the intent to commit robbery he can properly be convicted of the crime of assault with intent to do great bodily harm less than the crime of murder. 2. Where a witness has testified as to certain facts, further evidence, the only purpose of which would be to refresh her recollection as to those facts can be properly excluded. 3. Where an improper answer is promptly stricken out by the Court, a reversal will not be allowed on the ground that the witness was not sufficiently rebuked by the court. 4. Reversal will not be had because of comments made by the prosecuting officer which might properly have been checked by the court, it appearing that there was evidence upon which to base such remarks. 5. The question as to whether or not the entire deposition of a witness was received in evidence is not material where the witness upon the trial testifies as to the facts covered by the deposition. *People* v. *Smith.* (Sept. 26.)

EJECTMENT—TITLE BY ADVERSE POSSESSION.—In an action to show title to lands proceedings had under section 5990 in the Probate Court to determine heirs, are admissible. The statute not being limited to cases where the ancestors die after the passage of the acts, but may be invoked in any case, where any persons shall have deceased having title to land. As establishing continuous adverse possession a showing that the lands had been assessed to the grantors of plaintiff and taxes paid for a portion of the time would not alone be sufficient; it also appearing that for a portion of the time the land was abandoned and re-entered by one claiming under a patent from the United States. Where one other than the true owner went into possession of land in 1836 a continued possession of land for over a year, followed by no attempt for twenty-five by the true owner to claim title, would not, under the Revised Statutes of 1838, make such owner a stranger to the title. Under the express provisions of the statute the case will be governed by the statute as it existed prior to the revision. *Miller* v. *Davis.* (Sept. 26.)

FRAUDULENT CONVEYANCE—TRANSFER BY HUSBAND TO WIFE—WHEN IN FRAUD OF CREDITORS.—A transfer of property by a husband to his wife will be set aside as a fraud upon creditors where it appears from the wife's testimony that the conduct and acts of the parties to the transfer were constructively fraudulent, although it does not appear that there was any actual intent to defraud on the part of the wife. *Manf'g. Co. v. Perkins.* (Sept. 26).

LANDLORD AND TENANT—TENANCY AT WILL.—1. Where one occupies premises for the purpose of enabling him to carry on the services for which he is hired, there being no letting in terms, or rent reserved, the occupancy is that of the master and not of the servant. 2. A continued occupancy, however, by the servant, after the expiration of such tenancy, will be deemed that of a tenant by sufferance or at will. 3. A person in possession of land lawfully, who holds over without right, becomes a tenant at sufferance, if the owner suffers him to remain in possession a sufficient length of time to imply an intentional acquiescence in the occupancy, and ir is not necessary that the previous holding be that of a tenant. A consent to occupancy is not necessary to create a tenancy by sufferance. *School District No. 11* v. *Batsche.* (Sept 26.)

MUNICIPAL LAW—CONTRACT FOR PUBLIC IMPROVEMENTS.—A contract for public improvement having been awarded to the lowest bidder in accordance with the provisions of the city charter, the Board of Public Works have no authority to so change the plan as to increase the cost of construction to the contractor and to render the city liable for such increased expense. *Campau v. Detroit.*

PARTNERSHIP—NOTE GIVEN TO RETIRING PARTNER—WHEN JOINT OBLIGATION.—The stock of a partnership concern was sold, one of the partners, who had only a working interest, joined with the vendee in giving to the retiring partner a note for a portion of the purchase price. Subsequently the holder of the note repurchased the stock, paying part cash and turning back to the makers the note upon which a considerable amount was due. *Held:* That the obligations was not the individual debt of one partner, but a joint obligation, and that a transfer to the holder of the note, of the property which was subject to seizure by process against the two was not in fraud of creditors and could not be assailed by them. 2. There being no evidence tending to show that the re-purchase was not made in good faith and the vendee having a right to turn out the note in part payment, no error was committed in with drawing the case from the jury. *Oliver & Roberts Wire Co.* v. *Wheeler.* (Sept. 26.)

## CURRENT LITERATURE.

The October *Atlantic Monthly* is rich in good fiction. Mrs. Ward's powerful serial, A Singular Life, is concluded. There is a further installment of Gilbert Parker's Seats of the Mighty, which increases in interest with each succeeding issue. Further chapters of Charles Egbert Craddock's Mystery of Witch-Face Mountain also appear. One of the most striking contributions is another Japanese study by Lafcadio Hearn, entitled The Genius of Japanese Civilization. The third of Mr. Peabody's papers, An Architect's Vacation, tells of The Venetian Day.

Among other features is a paper by Susan Coolidge, on The Counress Potocka, and an unusually readable paper of travel by Alvan F. Sanborn, entitled The Wordsworth Country on Two Shillings a Day. Bradford Torrey's paper on Lookout Mountain is of peculiar interest in view of the memorable gathering there this summer. The book reviews, which constitute so important a part of every issue of the *Atlantic*, treat of a group of six stories much read and discussed at present.

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The ediior of the *Review of Reviews* finds several incidents in this fall's political situation on which to comment with effect in "The Progress of the World" for October; the part played by the liquor question in the New York campaign is very clearly described. The present difficulties of the U. S. Treasury and the bearings thereof on national politics are discussed. The opening of the Atlanta Exposition and the recent patriotic gatherings at Louisville and Chickamauga, the international yacht racing fiasco, the building of American battle-ships and Lord Wolseley's appointment as Commander-in-Chief of the British Army, are among the topics included in the month's survey.

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The members of the profession with sporting proclivities will be much interested in the article by Fred Mather on "Trout Culture" in the *Popular Science Monthly* for October. Fish culture has become quite an important industry, and as usual Michigan is not far behind in the enterprise. The State Fishery Commission has done a great amount of work during the past two or three years. The exhibit made at the recent State Fair was a very creditable one. This article is well illustrated and will be read with general interest. *Popular Science Monthly*, while never lowering its standard to cater to transient fads, always keeps abreast of the times.

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Among the long list of timely articles in the *North American Review* for October is one by Dr. Henry Smith Williams, on "Politics and the Insane". In it he fearlessly discussed the evil results of the present manner of selecting officials in charge of asylums and similar state institutions in many of the states. "A Study in Wives" is the subject of a unique symposium contributed by Max O'Rell, Grant Allan, Karl Blind and H. H. Boyeson, who discuss, respectively, the merits of the French, English, German and Scandinavian wives. Among the notes and comments is an interesting short article by John M. Stall on "Rural Free Mail Delivery".

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# *'ONE LAW FOR THE RICH AND ANOTHER FOR THE POOR.' A PROTEST.**

MR. C. H. PICKSTONE.

One of the most humiliating positions in which a man who takes any pride in his profession can possibly be placed is to hear his chosen calling publicly abused, and to have to remain silent because the particular charge is one he cannot refute. And this is a position in which a lawyer must of necessity occasionally find himself. At such times his pardonable pride in the law, and in himself as a representative of that law, retires to his boots, and he begins to wonder whether, after all, the object of his worship is a mere idol of wood and stone to which the people appeal in vain. Perhaps the most vulnerable spot in the whole system of our laws has been that which has lent itself to the contemptuous reproach that there is 'one law for the rich, and another for the poor.' That such a pernicious charge should have a shadow of foundation is greatly to be regretted, and I often wonder how it is we so frequently permit it to pass unchallenged, and thereby appear to countenance it. Possibly we trust too much to the notorious shortness of public memory to efface the recollection of the circumstances which from time to time give occasion for its illustration. We forget, however, that though, to the average citizen, yesterday and all its incidents is wiped out the moment it expires, and that, like the grasshopper in the fable, we live only in the present, there are yet scattered amongst us divers irrepressible individuals who, note-book in hand, eagerly record these ephemeral incidents to be used with effect at times—such as

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election times—when the public mind is more susceptible to the contagion of nasty things. However much we, as lawyers, may be inclined to ridicule the idea that there is in fact any foundation for the suggestion that the law is a respecter of persons, there can be no doubt that, as an abstract belief, the sentiment is inherent in the breasts of the whole of the lower classes, and that the periodical exhibition of concrete illustrations of it forms a weapon which is most effectively utilised by the agitator in his ceaseless war on capital. It has seemed to me that our supineness regarding the charge is to some extent due to the foundation upon which our legal education is built up. For, observe, upon what different lines proceeds the education of a lawyer and a man of business in this respect. The very first impression that is implanted in the mind of the embryo lawyer—and which forms the elementary truth on which his idea of law is hinged—is that the portals of justice are open to all comers indifferently. This is the fundamental creed for which there is no less an authority than Magna Charta itself. 'Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam.' Great words, eloquent words, these; words which had they been at all times, in all places, and under all circumstances faithfully insisted upon in their integrity, would have made the law as the embodiment of inexorable justice the dearest bulwark of our liberties. That this was the idea animating that determined band of primitive Radicals who nearly 700 years ago procured the Great Charter, and that their object was thought to have been accomplished, is evident when we bear in mind the language of Sir Edward Coke upon the point: 'Therefore,' says he, 'every subject for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done him freely without sale, fully without denial, and speedily without delay' (2 Inst. 55). However grandiloquent and open to satire this passage may sound to the layman of to-day, Blackstone (and later Stephen) lovingly takes his stand upon it, and makes it the text of his proud boast that 'the Courts must at all times be open to the subject.' Nor was the old common law herself slow to seize the situation. For did she not years ago expound her views in one of those trite maxims upon which our law is built up: 'Ubi jus, ibi remedium'? What more could possibly be claimed? For every wrong a remedy, and that remedy fully, freely, and without delay. Such being the basis of his education, is it

matter for wonder that the young lawyer starts a sceptic as regards the popular notion of law as being a luxury attainable only by the rich? But sooner or later he is destined to be troubled with doubts, and it gradually dawns upon him that what has seemed to him a calling second to none in its potentialities for good, is after all only looked upon by the public as a medium for earning bread and butter. The education of the business man, on the other hand, proceeds on wholly different lines. His mind has not been trained in the faith of Magna Charta, and nursed in an atmosphere of *ubi jus*. He knows nothing of either. Thank heaven he doesn't! For though the lot of him that expecteth nothing and gets it is hard, the lot of him who has been led to expect great things which are not realized is infinitely harder. It is the lawyer, not the layman, who is destined to disappointment. The business man's earliest conception of law is that it is synonymous with trouble; and, later, when he finds it a necessity, he terms it a 'luxury' and a 'necessary evil.' And the poor man, knowing that 'luxuries' are not for him, resignedly accepts the idea of it which comes from the street orator and the Sunday newspaper, and which is in accordance with his experience of other commodities—viz. that it is of two qualities: one for the rich, another for the poor. Here, then, we have two irreconcilable views: the legal one that 'Ubi jus. ibi remedium,' the popular one that there is one law for the rich, another for the poor. Because I am a patriotic lawyer I uphold the former, but because I desire to be perfectly just, I shall have something to say in reference to the tenacity of the latter. The truth is, that whatever foundation there might be for saying that the law is a respector of persons, it is not the fault of the law—meaning by the term 'law' the legal principles upon which the remedy is based. Used in this sense there is only one law, just as there is only one Gospel, for rich and poor alike; the trouble is that it must of necessity take money to put that law into motion, just as it takes money to carry the Gospel into foreign parts; and it is here—viz. in the administration of the law—that the poor man feels—or perhaps I ought rather say felt—the pinch. He finds that the sovereign of the rich man will do more than his humble shilling—not that it will buy legal principles of a different essential quality, but will command the services of the most proficient exponents of that law, who must always be the most effective, and whose employment, therefore, on the side of the rich man must, in the nature of things, handicap the poor man. It is not the law but the adminis-

tration of the law that has been to blame, and it is matter for regret that the fallacy of there being in this country legal principles of various qualities to suit varied purses is still permitted to mislead the public and injure the profession by bringing into unmerited disrepute a system of laws which is, without doubt, the finest in the world. There is nevertheless some truth in the popular notion, but truth of a kind which is overlooked by and scarcely helps the case of those who profess to believe it. For, singularly enough, the only case in which we literally do find two kinds of law—one for the rich, and another for the poor—are those in which the poor have been favoured by a special law of which the rich man cannot avail himself. Let us take a few examples: A gentleman takes an expensive residence, or a business man a warehouse. The one naturally expects to be able to live in his, the other to use it for the purposes of his business. Both may be disappointed. The house may be ruinous, insanitary, uninhabitable; the warehouse dangerous, and utterly unfit for the tenant's business. Both must grin and bear it. Both are held to their bargain, and neither has any remedy against the landlord for consequential damages (*Hart* v. *Windsor*, 12 M. & W. 68). On the other hand, let the poor man in his humble dwelling find anything amiss, and suffer any damage in consequence, the law, which turned a deaf ear to the importunity of the rich man, is instantly on the alert, and compels the landlord to make compensation (48 & 49 Vict. c. 72, s. 12). Again, the widow and children of a poor intestate may obtain letters of administration, free of duty, from the registrar of the district County Court on payment of a nominal fee (36 & 37 Vict. c. 52). Again, the salary or income of the rich man is at the mercy of his creditors by way of attachment. But the law's attachment is not extended to the wages of the poor man, and they cannot accordingly be touched (33 & 34 Vict. c. 30). Again, how often do we hear the bold assertion that a rich man, whose finances become hopelessly involved, may 'whitewash' himself through the Bankruptcy Court, whereas there is no similar relief for the poor man, who must bear his load of small debts as best he can. But this is, of course, a fallacy, as under section 122 of the Bankruptcy Act, 1883, a very effective whitewashing can be had at a nominal cost by the working man whose debts do not exceed 50*l*., whereby he gets all the protection and none of the terrors of bankruptcy. Once more—and this is a very apt illustration, suppose a blacksmith to get into arrear with the rent of his shop, and receive a visit from the certificated bailiff—

what happens? Why, the same old law that the poor blacksmith had thought was deaf to the appeal of poverty rushes to the rescue, and says to the bailiff, 'Stand back! You touch anything here at your peril; these things are privileged either as being in actual use or as being the tools of this poor fellow's trade' (51 & 52 Vict. c. 21, s. 2). And the bailiff retires discomfited. Then does this same bailiff, breathing out threatenings and slaughter against the disciples of the law, forthwith seek the office of the hard-pressed lawyer on a similar errand of mercy. What happens? Why, it is inconceivable that a lawyer can be a poor man, and so the place is stripped bare, even to the very books that the unfortunate lawyer is poring over, and the same old law that lovingly shielded the tools of the blacksmith turns a deaf ear to the appeal of the poor lawyer to at least protect his beloved books. And yet are his books not the tools of his trade? And, lastly, need I remind you that if a man has the good fortune to be so desperately poor that he can prove he has not 25*l.* worth of assets in the world, the generous law gives him something a richer man can by no possibility obtain, being nothing less than the priceless boon of free law. I do not suggest that the poor man is deliriously grateful for this concession; indeed, I have heard it hinted that 'this free law has some of the attributes of a free lunch and some of the quality of a pauper's coffin'. 'Upon this point I desire to express no opinion, but would merely point out that the free entrance to the Law Courts is not besieged by a struggling mass of ravenous litigants, such, for example, as surges round the insatiable public laundry, where husbands and wives are wont to wash their discoloured linen. In fact, though we offer the poor man free law, he does not seem to fancy it, and like every other phase of pauperism it is not popular. These are a few of the cases in which it occurs to me it may truly be said that there is one law for the rich and another for the poor. I commend them to the attention of those who cherish the popular interpretation of the cynicism, as they may perhaps remind them of that ancient individual who was summoned expressly to do some particularly virulent cursing, and unexpectedly gave forth a stream of blessing. But the agency that has done more than anything else to refute the reproach, and to bring justice and adequate protection to the door of the working man's home, is the County Court. I say, without fear of contradiction, that whenever the County Court is available as the remedial agency, the idea of the Great Charter is literally attained, and the poor man, every whit as certainly as the rich man, has 'justice and

right for the injury done him freely without sale, fully without denial, and speedily without delay.' That this is no empty boast will, I think, be conceded when it is borne in mind that the poor man may have an advocate of tried capacity, and may through his instrumentality recover—say 10*l.*—on contract or in tort, without incurring any solicitor's bill if he wins, and at the risk of having to pay his solicitor only 18*s.* if he loses, Eighteen shillings for services which often involve hours of thought, research, hard work, and anxiety, all borne by the solicitor personally! Compare this with the 3*l.* 10*s.* indorsed on a High Court writ for a miserable debt in respect to which the solicitor never expends one moment of time, and which may, in fact, be earned for him by his office-boy, whose salary it will pay for ten weeks! This handsome remuneration is no extravagant conception of mine adduced for purposes of display; it is (except in certain very special cases under section 119 of the County Court Act), full pay, and the solicitor cannot possibly recover more on a 10*l.* verdict, even from his own client (*Ex parte Lamond*, 57 Law J. Rep. Chanc. 503; L. R. 21 Q. B. Div. 242; *In re Langlois*, 60 Law J. Rep. Chanc. 123; L. R. (1891) 1 Q. B. 349). The fact is, there is no such thing as 'solicitor and client' costs in the County Court. There is only one scale—*i. e.* that between party and party—and consequently the successful plaintiff receives the fruits of his judgment, undiminished by that onerous deduction for solicitor and client costs which invariably absorbs all the honey from a High Court verdict. One never hears it said of a County Court judgment: 'Yes, he won the day; but there was nothing left after he had paid his solicitor.' Surely this must compel the law's detractors to admit that their pet conception of law as an expensive luxury, obtainable only by the rich, is, after all, a fallacy, and, indeed, a slander. In face of facts like these, what twaddle it is to rave about the 'inequality of the law'! I could adduce many proofs of the appreciation and confidence in which the County Court is held by the people. One striking one I should like to refer to, as it not only proves this, but demonstrates the unwisdom of offering to the poor man any other substitute. As is well known, the law at an early stage in its history, in order to carry out the policy of the Great Charter, laid down the principle that all contracts prohibiting the parties from taking their grievances into the Queen's Courts, or purporting to oust their jurisdiction in any particular case in favour of some self-constituted tribunal, are void, and, subject to the provisions of the Arbitration Act, 1889, this is still the law. As is

further known, Parliament, in its anxiety to assist a poor man, made a serious inroad upon this sound principle in the various Acts passed for the encouragement and protection of friendly, industrial, and building societies. Rightly or wrongly—wrongly, as I maintain —Parliament conceived that it would tend to the benefit of the working man to exclude the Queen's Courts from all jurisdiction over disputes between members of such societies and the societies, and to compel the party injured to submit his grievance absolutely and finally to the tribunal fixed by the rules, only allowing recourse to the Law Courts when the rules contained no provision as to the manner of determining disputes, or when the society omitted after a reasonable time to deal with the dispute under its rules. How has this experiment worked? Has it worked for or against justice for the working man? I say unhesitatingly, speaking more particularly in reference to friendly and industrial societies, that it has worked against justice and right for the poor man. My invariable experience has been—and scores of cases have come under my notice—that the injured party has no confidence whatever in obtaining justice from the society's tribunal, and innocently looks to the County Court for his remedy. And keen indeed is his disappointment when you have to tell him that Parliament has locked the door of his favourite tribunal and given the key to the society, who are accordingly masters of the situation; as the society will almost invariably be found to have taken advantage of the kindness of the Legislature, and to have a rule referring the dispute of some 'district committee', with, perhaps, a right of 'appeal' to an awe-inspiring 'general council'. How small are the chances of obtaining justice from such a tribunal when the society's exchequer is involved only those who are familiar with their *modus operandi* can appreciate. Indeed, the good old legal maxim, 'Nemo debet esse judex in propria sua causa,' is habitually outraged with impunity. So that what the Legislature intended as a boon for the special benefit of the working man is very often a curse and a means of perpetrating gross injustice—a striking illustration of the old adage, 'Save me from my friends.' A loophole for escape was, indeed, the other day opened by a robust decision of a strong Divisional Court, who held that if the society's tribunal did not proceed in accordance with the rules of natural justice their 'decision' was no decision, and accordingly the County Court became available to the injured party (*Bache* v. *Bellingham*, 69 L. T. 322). Unhappily—though I say it with all respect—the Court of Appeal, whither the society lost no time in taking so damaging a decision,

could not see it in the same light, holding that even had the committee been guilty of misconduct in arriving at their decision, it was, nevertheless, a 'decision,' and could not be treated as a nullity for the purpose of giving jurisdiction to the County Court (L. R. (1894) 1 Q. B. 107). I do not scruple to assert that not one in a hundred members of the innumerable friendly and industrial societies which lie scattered up and down the country dreams, until it is too late, that Parliament, in the garb of dear old grandmother, has closed to him the Courts of the land and left him—very often—to the tender mercies of the very persons who have got to pay, if any paying has to be done. Shade of illustrious Coke! But in order to carry out my determination to treat my subject impartially, I am compelled now to advert to the only instance in which I would admit there is, today, justification for the reproach that the law is a respecter of persons. But, even in this case, there is no question of one law for the rich and another for the poor; there is a legal remedy provided for a grievous wrong, but the remedy is impossible for the poor man because the only mode by which it can be made available is quite beyond his pocket; I refer to the law of divorce. Human nature is human nature, whether its representative be clothed in purple or rags, and the rich have no monopoly of the privilege of breaking the seventh commandment—though I regret to say, as things are at present, our law gives them a monopoly of the remedy. Fortunately, the moral standard of the working classes, at least when subject to the restraint of marriage, is, speaking generally, higher than that which prevails amongst the idle rich. And for this there are several obvious reasons. But, be that as it may, I have had frequent opportunities of painfully learning—and I am sure most of you will bear me out from your own experience—the appalling injustice inflicted upon the poor by their inability to divorce an unfaithful partner. Whether the home that is shattered is a cottage or a mansion makes no difference so far as regards the bitterness of the cup which the innocent party has to drain—indeed, the moral ruin is, perhaps, more disastrous in the poor home, because the hardships it entails on the innocent party cannot be escaped from. There is a notion—I have heard it myself—that divorce is a luxury, and, like other luxuries is necessarily lost to the workingman, and that, moreover, he does not feel the same urgent necessity for getting rid of a faithless partner as he does for having a ready means of recovering his wages. But, in accordance with the best traditions of our law, we are bound to provide a remedy for every wrong. And here is the

most grievous wrong of which human nature is capable—a wrong productive of consequences more permanent and far-reaching than any other wrong with which I am acquainted—a wrong that eats into the very vitals of the State, and paralyses the energies of those who are the immediate sufferers; and yet to a large majority of English people it is a wrong practically without a remedy, because that remedy is so utterly inaccessible. It is idle to say that, if we cheapened divorce, we should be immediately inundated with such a flood of cases that the Courts would be blocked. This very suggestion shows how fearful we are of learning the truth—*i. e.* that there are hundreds of innocent persons patiently enduring this most iniquitous wrong, because they cannot afford the remedy. I am not one of those who would enlarge the grounds upon which a divorce can be obtained; by no means enlarge the remedy, but by all means bring it within the reach of those who deserve it. How, then, can it be so brought within reach? The answer is plain and irresistible —through the instrumentality of the County Court, that Court which has acquitted itself with such signal success in every direction in which it has yet been tried, and which, as I have endeavoured to show, has earned the confidence and respect of the whole country. Surely and steadily, year by year, have the merits of this tribunal become recognised, and Parliament has not been slow to observe the signs of the times—viz. that it is the only tribunal which is really popular, because it is the only one whose justice fulfils the triple ideal set forth in Magna Charta of accessibility, economy, and despatch. If the law is to be saved from the stigma of being inaccessible to the poor man—a stigma than which there is none more dangerous to the State—there must be placed within his reach all the remedies that are within reach of the rich man, and the State fails in its duty to its citizens if it gives any countenance to the belief that legal redress is a luxury. The County Court already has a limited jurisdiction in Probate and Admiralty which it has discharged with credit to the country. Let it be intrusted with a limited jurisdiction in divorce, say, upon affidavit of the injured party that his or (if it is the wife) her husband's income does not exceed 3*l*. a week. The evil is undeniable, the necessity of relief even the Old Book itself concedes. What readier or more satisfactory solution of the difficulty could be desired than to confer upon County Court judges the powers of the president of the Divorce Decision within some such limits as I have suggested? In order to make the suggested remedy effect-

ual there is, however, one feature of the High Court divorce practice which would require modification. As matters stand a husband has to pay for the defence of his wife, whether she be innocent or guilty. I do not, of course, object to the law taking care an innocent wife should not be hampered in establishing her innocence by want of funds. But it is surely a monstrous shame that this law should enable a guilty woman to put forward an entirely vexatious defence for no other reason than the pleasure of adding to her unfortunate husbands misery an appalling bill of costs. This would never do in the County Court. It would be easy to compel the wife as a condition of being allowed to defend to declare her merits in a preliminary affidavit, though of course when such an affidavit was not forthcoming the Court would have to be on the alert against connivance. It may be said that this is not one of those 'reforms' which are insisted upon by those who advocate the cause of the workingman. My reply is, that the time of the professional reformer is so entirely absorbed in the pursuit of the illusory 'living wage,' and the various phases of the eternal warfare between capital and labour, that he overlooks domestic needs, including the fact that the workingman has a heart as well as a stomach, and that his wretched home may sometimes be more due to an errant partner than to the want of a 'living wage.' History and experience have taught us that the worst enemy of the State is a system of unequal laws—laws which handicap the poor man in asserting and maintaining his right against another's might. Discontent is always smouldering, and, as the professional agitator well knows, very little stirring sets it ablaze. Our law fortunately learned long since that the finest safety-valve for discontent is the right of public meeting and free speech. There are many less profitable occupations for the young constitutionalist —and such, I take it, every lawyer ought to be—than occasionally going out of his way to hear the views of his country's laws expressed by the poor man under circumstances where he is able to address his fellows with perfect freedom. The oratory may be occasionally turgid, the orator unjust, but the result offers plenty of food for reflection to those who desire that the law should have the implicit confidence of the people. It is because on such occasions I have observed that the charge which is most frequently made and most bitterly resented is that which heads my paper—because I think it is a charge that is misapprehended, and is to-day undeserved —and because I think the part silently played by the County Court in its refutation and in the evolution of the working classes generally

has not received the merit it deserves, that I determined to offer these few remarks. Finally, my thoughts revert once more to those ever-memorable words of the great Sir Edward Coke, in which he so eloquently reminds us that the aim of our law is to secure to every subject 'justice and right for the injury done him freely without sale, fully without denial, speedily without delay.' Although it is 300 years since these words were uttered, can anyone improve upon them as an ideal conception of what law ought to secure? What we as lawyers have to do is to take this conception of Coke's, and breathe into it the breath of life, so that it may cease to be merely the dry bones of a stillborn ideal, and become the living substance of an accomplished end. 'Finis coronat opus!'

## *IS IT CONSTITUTIONAL?*

The Legislature of 1895, of the State of Michigan undertook to make a law by which the judicial circuits in the interior of the State could furnish judges for Wayne County. The act does not specifically name Wayne County, yet when the law was under discussion in the legislature, it was argued that such a law was needed there—that the Wayne Circuit Court was a long way behind with its business and some plan must be adopted to enable the court to dispose of a large surplus of cases on hand, and so Act numbered 152 of the Session Laws of 1895 was enacted.

It was not pretended that Wayne County had no lawyers of sufficient ability to perform the duties of judge, nor that the constitution did not allow a sufficient increase of the number of judges in that circuit to do its business, but from considerations of economy or from the peculiar relations Wayne County bears to the balance of the State, it was considered wise to enact the law in question.

*Is the law constitutional?* Section one is as follows: "Whenever the business of any of the circuit courts of this state has accumulated beyond the capacity of the judge or judges of such circuit court to properly dispose of, it shall be the duty of the Governor of the State upon such showing of facts and request made by the presiding judge of such court to designate a judge or judges of some other circuit or circuits in this State whose official duties will permit for the time being to hold court temporarily for such time or term as he may deem advisable, and the judge or judges so designated shall perform the duties and hold court for such time or term, in like manner and with like effect as they severally and respectively could have done if they had been elected to such office in the circuit where such duties as judge are performed."

The constitution of the State of Michigan provides that "The state shall be divided into judicial circuits, in each of which the electors thereof shall elect one circuit judge who shall hold his office for the term of six years, and until his successor is elected and qualified. (The legislature may provide for the election of more than one circuit judge in the judicial circuit in which the City of Detroit is or may be situated and the circuit judge or judges of said circuit in addition to the salary

provided by this constitution shall receive from said County of Wayne, such additional salary as may from time to time be fixed and determined by the board of supervisors of said county)". *Art. VI., Sec. 6 Const.*

In accordance with that provision of the constitution the legislature enacted "That an election shall be held in each judicial circuit, by the electors thereof, of one circuit judge" etc. (*1 How. St. §243*).

By the foregoing constitutional provision, and the law enacted thereunder, it is plain, that the people of the State of Michigan preferred to elect their judges rather than have them appointed. The wisdom of this choice has been seriously questioned, but that choice is fixed by the constitution and the law, and until they are changed the elective system must remain. The constitution and the law provided that the state should be divided into judicial circuits, and the electors thereof were to elect their judges. Each elector was to have the right to express his preference for the man who should hold the scales of justice for his circuit.

By the letter and spirit of the constitution, every elector of the state was to have equal rights in the selection of their judges. The constitution further provides that "whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, he shall be deemed to have vacated his office." (*Art. VI., Sec. 22 Const.*)

Thus it clearly appears that the framers of the constitution intended that the judges of the circuit should be residents thereof, and that the electors of the circuit should select their own judges. It is true that the Supreme Court did hold that the electors of a circuit might elect a person who resides outside of the circuit, to be their judge, *Royce* v. *Goodwin, 22 Mich. 496,* yet many good jurists have thought that construction of the constitution was not in accord with its letter and spirit.

But in that case Judge Goodwin was elected by the voters of the circuit where he was to perform his duties. The right of the electors was respected, in permitting them to make their own choice, although their choice fell on a man without the circuit.

The constitution also expressly provides when a judge removes out of his circuit, he thereby vacates his office. (*Art. VI., Sec. 22, Const.*) So that the general duties of his office are to be performed for the constituency who elected him. There can be no other reason in requiring him to reside in the circuit where he was elected. If the voters chose to elect a non-resident, that was their right, but if they had by their votes expressed a preference for a resident, their judge must remain a resident—or in other words, if the voters of Wayne County

have expressed their wishes by their votes, to have resident judges preside over their Circuit Courts, it is not within the constitutional right of the legislature to make a law requiring non-resident judges to hold their courts "for such time or term in like manner and with like effect as they severally and respectively could have done, if they had been elected to such office in the circuit where such duties as judge are performed." It seems plain that a non-resident judge, who has not been elected by the people cannot act as judge in any county where he was not elected, the same as if he had been elected there.

It had been foreseen that the City of Detroit would grow rapidly, and that its business must increase. The people had anticipated that the time would come when the business of the Circuit Court of Wayne County would accumulate beyond the capacity of the judge or judges to properly dispose of it. In order to furnish a force of judges to meet such an emergency, the people have amended the constitution so that "the legislature may provide for the election of more than one circuit judge in the judicial circuit in which the City of Detroit is or may be situate," and have given the Board of Supervisors the power to pay additional salaries. Can it be possible that the legislature has the right to ignore the express provision of the constitution, and substitute therefor non-resident judges, and compel the county to pay them, whether they choose to or not?

It may be urged that the constitution provides that, "judges of the circuit courts may hold courts for each other. and shall do so when required by law." (*Art. VI., Sec. 11 Const.*)

This clause, however, is limited to arrangements made by one judge with another, to hold court for him. No extra compensation was provided, no traveling expenses are allowed. It was intended to apply, when one judge could not try a cause, by reason of having been counsel in the case or for some other such reason, whereby the judge was disqualified from sitting as judge. This clause of the constitution surely was not intended to authorize the establishment of additional courts, by judges outside their circuits.

The act also provides for the compensation of the judges who are required by the Governor to hold court in other circuits than their own beyond the limit allowed by the constitution. Section four of said Act No. 152 is as follows: "All the necessary expenses of said circuit judges, or either of them so designated in going from their respective places of residence for the purpose of so holding courts, and returning thereto, and all their other necessary expenses for that purpose, not exceeding the sum of ten dollars for each day

that either of such judges shall so hold court; shall, at the end of the time or term for which said judges respectively shall be so designated, when duly certified by them, be allowed by said circuit court, and shall thereupon be audited and allowed by the Board of County Auditors or the Board of Supervisors, as the case may be, for the county, and shall be paid out of the county treasury of the county where such court is held." It is insisted that the amounts allowed for traveling and hotel bills, are in excess of the constitutional limit, and void.

The constitution provides that "the judges of the circuit court shall each receive an annual salary of two thousand and five hundred dollars." "They shall receive no fees or perquisites whatever for the performance of any duty connected with their office. It shall not be competent for the legislature to increase the salaries herein provided." (*Art. IX., Sec. 1 Const., S. L. 1895, page 612*).

The word perquisites means, "something gained by a place or office,. beyond the regular salary or fee." *2 Bouvier, 409.* Of course the "necessary expenses" means their traveling and hotel expenses, not exceeding ten dollars, and under the act, these are furnished and paid by the county to the judges temporarily holding court under the direction of the Governor. This is surely adding to their income and are perquisites they receive as such judges over and above their salary allowed by law and is in violation of the constitution and void. The law providing for a non-resident judge holding court, in another circuit, the same as if he had been elected therein, is not only unconstitutional, but it is impracticable, and creates very much trouble, confusion and delay, in settling bills of exception, and in making and settling cases, in chancery, where testimony is taken in open court. The law is invalid, and ought to be so declared.

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## *NOTES.*

Our article "IS IT CONSTITUTIONAL," printed in this number, ought to prove of considerable interest to lawyers throughout the state. It is a matter which may affect legislation in any county under circumstances similar to those existing at the present in Wayne County. Our article should prove of peculiar interest to those whose cases come on trial in Wayne County, before judges elected in and for other circuits. When this legal question is tried in the courts—if it is tried—the discussion of the question contained in the MICHIGAN LAW JOURNAL will be a great help to the side which says that "Act No. 152 of the Session Laws of Michigan for 1895 is unconstitutional."

Our leading article for this month is an address delivered before the Incorporated Law Society of Liverpool, England. It has been given our space for the reason that it is very well written and contains many things applicable to our own system of laws. And while putting in a new light a like complaint often urged in this country, it shows that in some ways our laws are an advance over those of our cousins, the English. Our court costs are reasonable, even in courts of record, and on the subject of "divorce" certainly we have no reason to complain that the poor man cannot afford the expense of divorce proceedings. A short note in this number will show that point clearly. It may even suggest the thought that we go to the other extreme in permitting the marriage tie to be too easily dissolved.

It is only occasionally that a new idea visits us, but a novel scheme is now not only in use but has even become the every day occupation and means of livelihood of some enterprising citizen of

Chicago. It is this: there are many postal cards printed for some use for which they are afterwards not wanted. These cards are collected, the printing made to disappear by being bronzed and the cards thus made to furnish a bronzed surface on which to write or print. The postal authorities at Detroit say that many of these cards are now going through the mails. The Chicago firm offers them at a material reduction from the price at which the United States government seems able to sell them. The originator of an idea as novel as this deserves success in life. Here's to him.

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If certain deductions made by Melvin A. Root of Bay City are correct, an astonishing tncrease in the number of divorces applied for in Michigan will give food for thought. He figures that the population in 1894 was an increase of 20.92 per cent. over 1884, while the number of divorces begun was an increase of 55.25 per cent. over the number begun during 1884.

The following item on the subject is quoted from the Evening News of Detroit: "The rate of applications for divorce in Michigan per 100.000 population were respectively 86.9 and 111.6 for the years 1884 and 1894. There were 18,220 marriages in Michigan in 1894. The per cent. of applications for divorce to the number of marriages is 13.7, and the probable percentages of divorces, taking the probable number granted at 60 per cent. of the applications, is 8.2. The ratio of divorces to marriages in 1886, the last year of the government returns, was 8 per cent. One divorce is granted for every 12 marriages in Michigan."

## LEGAL MISCELLANY.

Property in the hands of a common carrier in transit to a place outside of the State is held not subject to garnishment, in the case of *Stevenot* v. *Koch* (*Minn.*) *28 L. R. A. 600*, in which case the authorities are collected and their conflict shown.

The share inherited by a grandson in lieu of his deceased parent, who would have been entitled thereto if alive, is held in *Powers* v. *Morrison* (*Tex.*) *28 L. R. A. 521*, to be unaffected by the parent's debt to the grandparent,—at least when the grandson received no property from his parent which would be subject to the latter's debts.

An oral agreement to give a pass to a man and his family for ten years, and stop trains for them, is sustained in *Weatherby, M. W. & N. W. R. Co.* v. *Wood* (*Tex.*) *28 L. R. A. 526*, on the ground that it might be performed within one year in case each member of the family should die, and therefore was saved from the statute of frauds.

A novel rule regulating the riding of bicycles on the sidewalks has been devised by the board of selectmen of the town of Stonington, Conn. No one will be allowed to ride a wheel on the sidewalk between the hours of 6 p. m. and 6 a. m., but during the day all bicyclists will be unmolested while on the sidewalks, provided they dismount when within 50 feet of any pedestrian. Thus, if a rider prefers to use the sidewalks during the day, he must not forget that when he sights a pedestrian it is his duty to dismount and wait until the person on foot covers the required distance of 50 feet. Then he can again mount to pursue his way without fear of falling into the hands of the constables.

In *Tarkington* v. *State*, *17 South Rep. 768.* decided by the Supreme Court of Mississippi, it appeared that during their deliberations a jury occupied the court room, and nine persons connected with the court, two of whom had testified for the State, remained therein. It was held that the conviction of Tarkington, the defendant, of a criminal offense should be set aside, though it did not appear that any of such persons spoke to the jurors except the clerk, who asked them if they were likely to agree on a verdict.

The end of the turmoil created in Sidney by the *Dean Case* offers food for reflection to the student of criminal law and procedure. A man guilty of attempt to murder and condemned to death under the law of New South Wales assisted in an agitation for a free pardon to himself, and, as an incident therein, made an affidavit of his innocence. For this he has now been convicted of perjury and sentenced to a long term of imprisonment. This offers a new terror to the defendant when he is allowed to give evidence. A man may be acquitted by the belief of one jury in his truthfulness, but sentenced for perjury on the verdict of a subsequent jury; or he may be convicted and then retried for perjury committed in his own defence. The old procedure by attaint never applied in a criminal case; but a new mode of reviewing the verdicts of juries offers itself as soon as the Criminal Evidence Bill passes into law. If a defendant is allowed to testify it is apparently inevitable that he should be liable to the pains and penalties of perjury, but the result is an obvious and serious innovation in the English law.—*London Law Journal.*

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When legal papers are served by mail the postage must be prepaid in full to make the service valid. The office boy of a prominent Broadway firm a few days ago put a two cent stamp on a letter containing the summons and complaint in a case and mailed it to the defendant's counsel. The postage was two cents short, and the defendant's counsel, after paying the additional two cents, was in a position to claim judgment by default, on the ground that he had not been legally served. The plaintiff's attorney immediately got an order to show cause why the default should not be opened. There was a long argument in court and several lengthy affidavits were submitted. The case was finally reopened upon payment by the plaintiff of $30 costs.

Thus, the time of the court for nearly two hours, $30 costs and fees of two leading lawyers were made necessary to correct a mistake of two cents by an office boy.—*New York Herald.*

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The judgment of the Supreme Court of South Carolina in the case of *McCreery* v. *Davis* on the subject of the effect of a divorce in another state may be correct from the standpoint of precedent. The court, at least, reviews conscientiously all the cases bearing on the question and apparently reaches an authoritative conclusion. But the doctrine laid down does not seem to be just, upon principle, or one which is calculated to bring about that harmony of administration of the law in the states which is so desirable. In that case it appeared that a citizen of South Carolina was married in New York to a citizen of that state, and immediately thereafter the parties continued to reside in South Carolina, till the wife left her

husband, and resided in Illinois. Judgment of divorce was there obtained, in accordance with laws of Illinois. but without personal service on or appearance of husband, on a ground not recognized as cause for divorce in New York or South Carolina. It was held that the Illinois judgment was void in South Carolina, and that article 4, § 1 of the United States Constitution providing that full faith and credit shall be given in each State to the judicial proceedings of every other State and the act of congress providing that records and proceedings thereof, properly authenticated shall have such faith and credit given them, in every court of the United States as they have in the state whence they may be taken, does not prevent an inquiry into the jurisdiction of the court rendering such judgment. The decision leaves Mrs. McCreery, the party divorced according to the laws of Illinois, in rather an anomalous legal position. While she is a single person in Illinois, in South Carolina she is the lawful wife of Mr. McCreery. Many absurd results are liable to spring from this confusion. For instance, as an exchange suggests, if Mrs. McCreery should now marry Mr. Doe in Illinois, then obtain a divorce, say in Ohio, she would on the principle of that decision, be a lawful widow in Ohio, and yet be the lawful wife of Mr. Dow of Illinois. She could then marry Mr. Roe in Ohio, and be divorced in Indiada, and thereby become a lawful widow again, and yet, at the same time, be the lawful wife of Mr. McCreery, Mr. Doe and Mr. Roe, and, by extending her escapades, she could have as many lawful husbands, at one and the same time as there are States in the Union. The decision of the South Carolina Courts is predicted upon the doctrine that a *status* acquired in one State has no extraterritorial operation and is not thereby established in another. It seems to us that it would be better to eliminate from divorce law the idea growing out of the word *status*, and to make marriage contracts, like any other contract, subject to the laws of society and citizenship and to make a decree of divorce granted by court of competent jurisdiction in the state where rights of citizenship are acquired, unimpeachable by courts of other states. The commission appointed for the purpose of securing uniformity of law and legal proceedure in the states should make note of this South Carolina case as a text for action on the subject of divorce laws.—*Central Law Journal.*

# BOOK REVIEWS.

The Constitution of the United States at the End of the First Century. By GEORGE S. BOUTWELL. D. C. Heath & Co., Boston, Mass. One vol. 8vo. Cloth, 412 pp.

The preface of this volume on the Constitution of the United States gives perhaps as good an explanation of the field which it is designed to occupy as any lengthy review could afford. It says: "It has been my purpose, in the preparation of this volume, to set forth in a concise form the substance of the leading decisions of the Supreme Court, in which the several articles, sections, and clauses of the Constitution of the United States have been examined, explained and interpreted." There is no attempt at interpreting the Constitution independent of the case law on the subject, but the book is the result of conscientious, laborious, clerical work. It will be of interest to all who desire to make a critical study of our scheme of government, but the great number of cases cited will of course be useful and helpful only to the lawyer or those having access to law libraries. There is in connection with the Declaration of Independence, the Articles of Confederation of the United States of America, the ordinance establishing the North-west Territorial Government and the Constitution of the United States, a careful review of the leading historical facts which resulted in the Constitution. It is a useful volume to the lawyer and a valuable addition to any library. It will be of especial interest to Michigan lawyers, as it is arranged by George S. Boutwell, who is a graduate of Michigan's own university at Ann Arbor.

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VanFleet's Former Adjudication. By JOHN M. VANFLEET, author of "Collateral Attack on Judicial Proceedings." Indianapolis and Kansas City: The Bowen-Merrill Company. Two vol. 8vo. 1624 pp. $12.00.

This work is in two large volumes and contains an amount of material which would take years to digest. It is in truth the result of years of hard work in studying, arranging and analysing the cases passed upon, and is a further discussion of much contained in the author's preceding book, "Collateral Attack on Judicial Proceedings." Just how far points raised in a case are concluded by judgments in other cases, is here laid down in a masterly manner. The author has in some cases shown that his own opinions are firmly rooted and, as he says, he does not hesitate to express his views where cases differ. This is not, however, a fault since his exhaustive study of the question has given him a right to entertain decided opinions.

## RECENT MICHIGAN DECISIONS.

CONTRACT LAW—PAROL EVIDENCE—WHEN INADMISSABLE TO VARY TERMS OF WRITTEN CONTRACT—ORAL EVIDENCE TO EXPLAIN WARRANTY—WHEN INADMISSABLE—Parol testimony may be admitted when there is writing between the parties which does not embody all the terms of the contract, but is not admissible to contradict that portion of the agreement which has been reduced to writing.

Although the warranty set forth in the contract is vague in its terms, parol testimony cannot be admitted to show that it was in fact more definite. *Hutchinson Mfg. Co.* v. *Pinch.* (Oct. 22).

CHANCERY PRACTICE—ACTION BY CREDITOR TO SET ASIDE FRAUDULENT CONVEYANCE BY DEBTOR—JOINDER OF PARTIES—Where a creditor seeks to set aside all conveyances made by a debtor in order to accomplish a single object, viz.: the satisfaction of his judgment out of the property so conveyed, the bill is not multifarious. *Hulbert* v. *Detroit Cycle Co.* (Nov. 5).

EMPLOYER'S LIEN ON FOREST PRODUCTS—EFFECT OF SALE DURING TIME LIMITED FOR FILING STATEMENT—RIGHT OF VENDEE TO IGNORE CONTRACT FOR PURCHASE—Section 8427, 3 Howell's Statutes, providing for an employee's lien upon forest products for labor performed, continues the lien in force for thirty days after the performance of the labor; and expressly provides that any sale or transfer of the product during the time limited for filing the statement, shall in no way affect the lien.

One buying forest products has a reasonable time in which to ascertain as to labor liens, and where he has knowledge that liens are claimed he is justified in refusing to proceed with the contract until the incumbrance is removed. *Saxton* v. *Krein.* (Nov. 5).

ERRONEOUS DESCRIPTION IN DEED—AUTHORITY OF COURT TO RECTIFY—PURCHASE OF LAND WITH KNOWLEDGE OF ANOTHERS POSSESSION—CHANCERY PRACTICE.—An objection to a bill on the ground of multifariousness must be taken by demurrer and cannot be raised upon the hearing after an answer has been filed.

It is the duty of one who purchases land in the possession of a third person, to make inquiries as to what claim he has upon the premises, and failing to do this, he takes the land subject to the equities of the person in possession. *Minor* v. *Wilson.* (Nov. 5.).

GARNISHMENT PROCEEDINGS—SERVICE OF PRINCIPAL DEFENDANT IN FOREIGN STATE—COMMENCEMENT OF SUIT—SEC. 8058 HOW. STAT. CONSTRUED—The language of How. Stat., Sec. 8058: "At the time of, or after the commencement of suit," relative to the commencement of garnishee proceedings, refers to the filing of the declaration or other act, entitling the plaintiff to process. *McDonald* v. *Sinclair.* (Oct. 22).

MASTER AND SERVANT—USE BY EMPLOYEE OF DEFECTIVE APPLIANCES WITHOUT PROTEST.—An employee cannot recover for injuries resulting from the use of a defective car, it being shown that he used the car without protest and with knowledge of such defect.—*Shackelton* v. *Ry. Co.* (Oct. 22).

TAXES—TAX LAW OF 1889 CONSTRUED—ACCOUNTING BETWEEN STATE AND COUNTY—INTEREST ON COLLECTIONS—COUNTY'S LIABILITY FOR EXPENSE OF STATE MILITIA USED TO RENDER ASSISTANCE TO COUNTY—RIGHT OF SUPERVISORS TO AUDIT BILLS DENIED.—1. In proceedings instituted by Auditor General to enforce payment of certain sums due the state from Bay County, *Held:* Overpayments by the county to the state if made would be the basis of a claim against the state, but could not be introduced as an off-set in an action begun by the state against the county for the collection of an amount claimed due to the state.

2. In apportioning the state tax in 1883, the Auditor General apportioned it upon the valuation of Bay County as it had previously existed, notwithstanding the fact that the county of Arenac had been carved from its limits. The tax was collected, and accounting to the state for the whole amount refused on the ground that it was excessive, *Held:* That while an apportionment of state and county taxes may be incorrect and excessive as to one locality or another, and while the proper officials might be justified in not assessing or collecting such excess, having once collected it they cannot refuse to turn it over.

3. Where townships collect and retain state money, the state is entitled to interest on the same and the amount can be recovered from the county. The four per cent. collection fee provided for by Sec. 31, Act 195, Laws of 1889, in cases where the tax is paid after January 1st, must be regarded purely as a collection fee and not as a penalty intended to reimburse the state for its expenses. When the money is realized by sale or redemption at the office of the county treasurer, such sums belong to the county.

4. Under the provisions of Section 129 of the tax law of 1889, the loss, if any, resulting from sale of lands bid off in the name of the state for taxes assessed in previous years, must be borne by the county.

5. In compliance with Section 104, of the tax law of 1885, the money paid by one Briggs for lands at a tax sale admittedly void, was refunded and the amount charged to the county. *Held*: That the county should be charged with all but the state tax which should be deducted from the claim of the state.

6. Act 169 of the laws of 1885, providing for the auditing of the bills for the state militia when engaged in service, and for charging the amount to the county for which the service is rendered is constitutional.

The provision of Art. 10, Sec. 10 of the Constitution, by which the board of supervisors has "exclusive power to prescribe and fix the compensation for all services rendered for the county" and "all claims against the county" to the exclusion of appeal, has no application to such claims. *Turner* v. *Board of Supervisors.* (Oct. 10).

TEXT BOOKS—AUTHORITY OF BOARD OF EDUCATION TO CHANGE—PARLIAMENTARY PRACTICE—At a meeting of the board of education of the city of Grand Rapids a committee to whom the matter of a proposed change of text books had been referred, reported in favor of such change. A motion to lay the report on the table was lost by a yea and nay vote, fifteen members voting in favor of the motion and six against it. The motion having been declared lost, a motion to adopt the report was then put, thirteen members voting yea and eight nay, the motion was declared carried.

*Held*:—That the board having, in compliance with rule 66, refused, by a two-thirds vote of all members present, to lay the report on the table, its action was in effect a suspension of rule 13 of the board relative to the steps to be taken in adopting a change of text books. That action having been taken there was nothing before the board but the report to be acted upon which was regularly adopted by a majority vote of the members.

With mere questions of parliamentary practice the courts will not interfere. *Kendall* v. *Board of Education.* (Oct. 22).

WATER CRAFT LAW—DREDGE NOT A VESSEL WITHIN THE MEANING OF CHAPTER 285, HOWELL'S STATUTES—Chapter 285, Howell's Statutes, providing for the collection of demands against water craft, cannot be construed to include a dredge used only for digging material under the water, and which is incapable of being used as a means of transportation on the water except by removing its machinery and transforming it into something for which it was never intended to be used. *Bartlett* v. *Steam Dredge No. 14.* (Nov. 5).

WILL—LEGACY WHEN CHARGE UPON REAL ESTATE—SUFFICIENCY OF BILL TO ENFORCE PAYMENT OF LEGACY.—Action by complainant who had purchased the interest of a legatee of the estate of one Warner, deceased, to compel payment of the same by defendant who had purchased the real estate of said deceased from the executer with the agreement that the vendee would pay and discharge all claims and legacies. The principal question was whether the real estate was chargeable with the payment of the legacy.

*Held*:—When it satisfactorily appears that the devise was given on condition or on the consideration that the devisee should pay the legacy, the land will be charged with its payments.

2. That under the allegations of the bill, the question of the personal liability of the defendant is immaterial.

3. It was not necessary to join as parties defendant the other legaties named in the will. *Chase* v. *Warner.* (Oct. 22).

## CURRENT LITERATURE.

The Hon. David A. Wells begins a series of articles on taxation in the November *Popular Science Monthly*. With this number this leading magazine begins its forty-eighth volume. This series of articles will no doubt prove to be a valuable feature, for no one is better fitted to undertake the preparation of such a series than is Mr. Wells. Another article in this number of particular interest to the legal fraternity is the one by Herbert Spencer on "Judge and Lawyer," it being the seventh of a series by that well-known thinker on "Professional institutions."

The *North American Review* persists in keeping abreast with the times. The November number has two valuable contributions upon "Our Duty in the Venezuelan Crisis," written by Congressman Wheeler of Alabama and Congressman Grosvenor of Iowa. Governor Oates of Alabama also writes of the "Industrial Development of the South." Austin Corbin contributes a highly interesting article "Quick Transit between New York and London." Major-General Miles writes of "Our Acquisition of Territory," and Benjamin F. Clayton, president of the Farmers' National Congress, of the "True Source of American Wealth."

*Public Opinion* comes every week with the regularity of clock-work. It always arrives on the same day of the week, and almost invariably at the same hour. This month's numbers are replete with election echoes and other timely topics. As a time saver this paper has no equal.

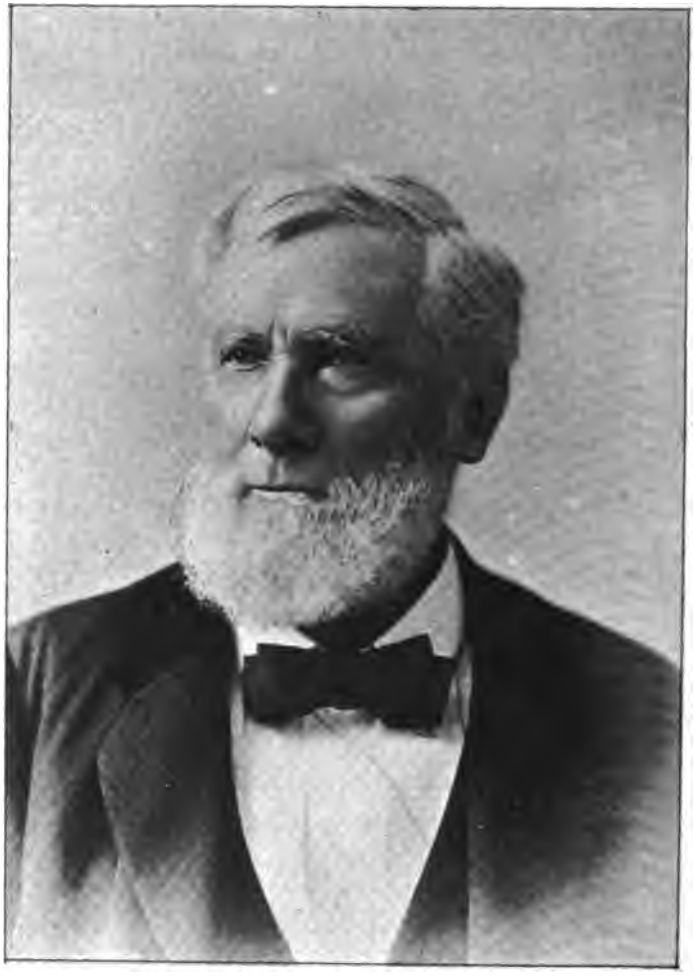
"The Present Condition of Russia," "Macedonia and Macedonians," "The Future Emperor King," are the titles of some of the most interesting and instructive articles in the later numbers of *Littell's Living Age*. The first gives a general survey of the industrial, educational, political and social condition of Russia. The last is the title of a pen picture of Archduke Karl Ludwig, who, it is feared, will not be able to meet Austria's need of a strong hand and a cool head now when the strife is so great for political power between the few on the one hand and the many on the other; when class is arrayed against class, race against race, and creed against creed.

The *Metaphysical Magazine* for November proves to be an interesting number in its peculiar field. The second part of "Initiation: The Self and the 'Selves'," is the leading article, and is followed by several other interesting ones on kindred subjects. "The Reformatory Office of Mental Suggestion" is the best of these and is a clever adaption of the now well-known principle in psychology of the value and effect of suggestions.

The *Green Bag* for November contains several very interesting articles. Among them is a well written one entitled "Appeals to the Highest Court" by George H. Westley. The others are "Thomas Chandler Haliburton," "The Imprisonment of Dr. Cornelius Hertz," and the second paper on "The Supreme Court of Maine."

The key note of the November number of *The American Magazine of Civics* is "Reform." In "The Higher Measurements of Character" one sentence reads: "It is always disagreeable to assume the airs of a reformer, for it seems to imply that one is wiser than his own day and generation at least in his own conceit." The article is an interesting one and makes several valuable suggestions for the suppression of crime. "Reform and Reforms" starts with the sentence "I adhere to the conviction that the average professional reformer is unsafe if not a positively dangerous man." "Washington's Valedictory" comments on the suggestions made by Washington towards the close of his second term as president; "Remedies for Political Evils," "A Return to the Basic Principles of Self-Government," and "A Lawyer's Obligations to the Public" by Hon. Thomas M. Cooley, are all in the same line. "Do Irish-Americans hate England? A Reply," An Economic Failure," and "The Christian Citizen and the Municipality," rounds out a number of more than usual interest.

"Louis Pasteur, Scientist," "Recent Progress of Italian Cities," written by Albert Shaw, whose work as editor is so much admired, together with an article entitled "Episcopy's Sojourn at Minneapolis," and another "In the Field of International Sport," make up the special features of the November *Review of Reviews*. The regular departments are exceptionally good, the Progress of the World containing very much of unusual interest.



James F. Joy.

# MICHIGAN LAW JOURNAL.

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## *JAMES F. JOY.*

FRED CARLISLE.

Some writer has said "No species of writing seems more worthy of cultivation than biography." I suppose he means that facts and incidents may be changed in form and expression so as to add new interest in and convey different impressions of the same individuals from those imbibed by previous efforts.

James Frederick Joy has been so long prominent in Detroit and elsewhere as to make it a delicate as well as a difficult task to do him justice or to add much to what has been said or written concerning his life and character.

We find from the provincial and state records of New Hampshire that his ancestors were participants in the wars between the colonists, the French and Indians and Great Britian. The most prominent of them were Samuel, Ebenezer, David, Sr. and David Joy, Jr. The first was a member in 1740 of Captain John Smith's company of New Hampshire troops; David, Sr. was also a member of the same regiment, and both were in active service at intervals during the French and Indian wars of the period—from 1740 to 1763. Ebenezer Joy served with both Generals Stark and Chase as a volunteer and in 1780, joined the line troops under command of Colonel Moses Nichols at West Point, where he served until the peace of 1783.

In 1732 at Oyster Bay—as it was then called—which was a part of the Parish of Dover, Samuel Joy, with others, organized the town of Durham, Stratford County, where on December 2nd, 1810, James F. Joy was born. In 1749, Samuel Joy and a number of his companions petitioned Mr. Benning Wentworth, the Captain General of the Province of New Hampshire for a grant of land six

miles square for the purpose, as they alleged, of placing it under cultivation, and establishing a new settlement. The record is silent as to whether their request was granted or not, but we infer however that it was, as we learn that afterwards Samuel, Ebenezer and David Joy applied to the General Court for the remission of taxes on lands which taxes they alleged were unjustly imposed "in violation of the terms of the grant recently obtained from the representative of the Crown." Neither have we been able to learn the location of the lands, but it must have been far north of Durham, possibly on the Merrimac river, since we know that Captain Ebenezer Webster, who fought the French and Indians with the Joys, was one of a party who located and was one of the first settlers on the Merrimac "where", said Daniel Webster, "Ebenezer lapped on a little beyond any other comer, built his log cabin, lighted his fire, and his smoke ascended nearer the North Star than that of any other of his Majesty's New England subjects."

James Joy, the father of James F. was a manufacturer, a man of enterprise and an encourager of education, as the records show that he gave lands and pecuniary aid for the establishment of Pittsfield Academy. He wished his son to bear his own name and so had him christened "James." An intimate friend of the family, was influential enough to get the middle name of Frederick adopted. In his school boy and student days the second name clung to him and he was known as Fred Joy. His companions of those times and places would not recognize their early friend under the name of "James F." by which he is so well known in Michigan and the West.

Mr. Joy acquired his education fitting him for college in the school of his native town. He took his literary degree from Dartmouth College in 1833 and completed his law course at Cambridge Law School in 1836, and Justice Story and Professor Greenleaf were his immediate preceptors at the latter institution. During the interim between 1834-5, he acted as principal of the Pittsfield Academy, and class tutor at Dartmouth College. He settled in Detroit in September 1836, and was on the completion of his law studies admitted to the bar with the Hon. Augustus Porter the following year, and then entered into a co-partnership with George F. Porter under the name of Joy and Porter.

The noted lawyers of that day and whom Mr. Joy was frequently to meet in legal contest were Ex-Governor and Ex. U. S. Senator William Woodbridge, Charles W. Whipple, B. F. H.

Witherell, Judge Daniel Goodwin, A. S. Porter, A. S. Buel, Samuel T. Douglas, Henry Chipman, Henry N. Walker, Theodore Romeyn, Alexander D. Frazer, Jacob M. Howard, James A. VanDyke, Halmer H. Emmons, and George V. N. Lothrop; of all these worthies Messrs. Joy, Lothrop and Douglas alone survive.

Mr. Joy arrived in Detroit at a period when Michigan was in a transistion state. Although the act of admission as a state had passed Congress June 15, 1836, conditions were attached requiring the assent of the people through a representative convention, in respect to the boundaries defined in the act. This convention assented in December, 1836, and the formal act of admission was passed by Congress, January 26, 1837.

Mr. Joy thus became a contemporary with Michigan, as a state. He came here with no capital, without powerful connections and without an established pecuniary credit. He had, however, the powers and qualities, formed by habit and education, which made him independent of either capital, connections or pecuniary credit—a clear head, a sound judgment, quick perceptions, and a mind the most comprehensive and most masterly in being able to grasp intricate legal and business propositions. To these high intellectual powers were joined a great moral force of character, a resolute will, a bearing self-reliant and firm, combined with strict integrity. He inspired confidence, and with the patient perseverance necessary to success laid the foundation and guaranteed the prosperity and usefulness which his subsequent life has demonstrated and developed. Not to any accident of birth or fortune, or any external circumstances or conditions can we trace the extraordinary results achieved through his influence. In addition to the qualities named, the only advantages which he inherited and which he still retains, are a fine personal appearance and a commanding and impressive address.

Soon after the formation of the law firm, Messrs. Joy and Porter were chosen the attorneys of the Bank of Michigan, at that time one of the largest financial institutions of the state, and one of very few having a recognized banking credit east or in the northwest. About the same time Mr. Joy became the confidential adviser and counsel for the Messrs. Dwight, who not only controlled the Bank of Michigan, but banks in New York, Boston, Springfield, Mass., and Cleveland, Ohio. Subsequently, when the Bank of Michigan became insolvent, all its affairs were closed up by him. Thus through the relations named and the litigations connected therewith, he had

occasion to test his own and the abilities of some of the greatest legal minds of that day.

As a practitioner before the Federal and state courts Mr. Joy was, and is to-day, recognized as the peer of any. Among the important cases, in which he was employed may be mentioned, that of Bates vs. The Illinois Central Railway Company, involving the title to the present site of its own and that of the Michigan Central railroad depot grounds at Chicago. Against him in this case were John A. Mills and Nathaniel McLean. The issue was favorable to Mr. Joy. Another one in which he appeared as attorney was the Great Railroad Conspiracy case in which he was brought in contact with the late Wm. H. Seward. In this case he represented the Michigan Central Railroad.

Doubtless Mr. Joy's extended acquaintance, acquired through his connection with Mr. Dwight, secured for him the confidence of eastern capitalists and he was thus able to secure their aid in 1846 when the young State of Michigan was relieved from her financial embarassments, by the sale of the Detroit and St. Joseph Railroad which had previously been owned by the state. This he did, and changing its terminus from St. Joseph to Chicago reorganized it, under its present name, "The Michigan Central." From that period until recently he has been actively indentified with the railway interests of Michigan, Illinois, Iowa, Kansas, Nebraska and Canada.

He, with John W. Brooks, was the projector of the Chicago, Burlington & Quincy Railroad, and he himself raised all the money by means of which the building of the road was undertaken. This railroad crosses the states of Illinois and Iowa, east and west, and now connects with the Union Pacific at Omaha, and with the Hannibal & St. Joseph at Quincy. He built the road from Kansas City to the indian country, through Fort Scott, and also built the first bridge across the Missouri at Kansas City and the two bridges across the Mississippi at Quincy and Burlington.

The following are among the Michigan Roads built by him or through instrumentality; "Detroit, Lansing and Northern," "Detroit and Bay City," "Air Line," "Jackson, Lansing and Saginaw," "Chicago and West Michigan," "Kalamazoo and South Haven," and "Wabash." He is to-day President of the Detroit Union Railroad Depot and Station Company, and in connection with Hon. Wm. W. Crapo, planned the new Fort Street Union Depot which cost over two millions of dollars.

From 1846 to the present time Mr. Joy has been the chief factor in the construction of 2,210 miles of railway in Michigan and the chief promoter in over 6000 miles of railway directly connecting with and entering Detroit from other States, and has thus been the chief instrument in the fulfillment of that prediction made in 1833 by the Hon. Abbot Lawrence of Boston: "We shall live to see the banks of the upper Mississippi connected by iron bands with State Street, Boston."

Mr. Joy, although devoting much of his time and energy to the promotion of great railway and manufacturing enterprises, has nevertheless been pre-eminently a lawyer all his life. He has also given much study and thought to that branch of political ethics, which has to do with the regulation and government of a nation, the preservation of its safety, peace and prosperity, the defense of its existence and rights, the augmentation of its strength and developement of its resources, the protection of its citizens in their rights with the preservation and improvement of their morals and intelligence. In this sense Mr. Joy has been considered a politician and therefore has been the intimate and trusted adviser of the great political leaders of his time who have sought his counsel upon important matters requiring legislation. He has also been an earnest friend of education and for several years served as a Regent of the Michigan University. He has also served as a member of the State Legislation. During his absence in Europe in 1880 he was chosen as delegate at large to represent his state in the Republican National Convention and presented the name of James G. Blaine as Michigan's choice for President.

Providence has permitted Mr. Joy to live and contemplate many marvelous changes fostered by his aid and wrought through his instrumentality. He has witnessed forests disappear, and cities, towns and villages, teeming with a wealthy and intelligent population, take their places. He has seen broad rivers spanned with bridges of steel, and mountains leveled, that the iron horse might pass over and through unobstructed.

He has witnessed the progress of science by which space is almost instantly annihilated; the advance of learning, of art, of manufactures, in the development and utilization of the natural resources of this great Northwest. All have been promoted through his agency. Mr. Joy has recently passed his eighty-fifth year. That he may be spared many more birthdays, should be the desire and wish of the citizens of Detroit, and Michigan, as well as of those who dwell in the cities and states, to whom he has been so great a benefactor.

# WHAT COURTS ARE FOR.

ERVIN PALMER.

Our nation is the first great republic that has weathered the storms of a century. It was a new departure from monarchical government, and it has stood so long, and is likely to stand much longer, because it was founded in wisdom, and has hitherto been sustained by the courage, patriotism and good sense of its people. Its citizens are all sovereigns, and they delegate to those who shall carry out their will, and be their official servants, the duties they are required to perform, and the temporary power they are authorized to exercise by the constitution and the laws under which we exist as a nation. It has always been the boast of our people, that here, if nowhere else, all are equal before the law. This sounds well and is a beautiful theory, and it is a fact in practice, as near as it has ever been in any other country. However, as time goes on, it is well occasionally for us to examine our compass and see if we are sailing according to the chart made by the founders of our country. It is not claimed that the earlier views of government are necessarily better than some of the modern conceptions of constitutional governments. Still, it is hazardous to lay aside some of the cardinal principals that entered into our original compact. There must be bed rock, and it must remain the foundation. Nearly one hundred and twenty years have passed since the fathers made their Declaration of Independence, and many things have crept into our laws and customs which are not in full accord with the sentiments therein expressed. They declared to all the world in their defense for humanity and their zeal for justice and the right, "We hold these truths to be self-evident, that all men are created equal—that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; and that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." "When a long train of abuses

and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right—it is their duty—to throw off govornment, and to provide new guards for their future security."

These are strong and fitting words, and worthy of the men who subscribed to them. It would have been far better for their posterity, had they been strictly true, and they had adopted and practiced the noble sentiments thus expressed. These utterances are grand and inspiring in theory, but in many ways they lack the element of verity. It is not self-evident that all men are created equal. When the parents of a child and their environments are known, his general capabilities and course can be fairly predicted and mapped out before he is born. It can usually be predicted whether he will be a giant or a pigmy mentally or physically; heredity will make or mar him. Civilly it can be seen whether he will be a king, prince, peasant, pauper or an abject slave. It will be seen whether he will stand at the head of a proud and fashionable court and lead in the great circle of educated and cultured men, or whether he will be one of the lowest of the low inhabitants of Tom-all-alone alley. Commercially it can be seen whether it will be possible for him to stand at the head of some large business house or powerful corporation, or whether he will be used to labor like a machine without thought, without hope. The breeding and environments of children do not make it self-evident that they are created equal. Even the color of the skin occasions inequality. The black skin is handicapped from the cradle to the grave. As time goes on the natural result of environment at birth and through childhood is usually verified by later life. The most stupid and casual observer can see it in every land. In this, our blessed country, the inequality of men is as visible as anywhere else.

In the most advanced christian civilization of this century, the inequality of men, and their rights, have not been overcome, nor is it very apparent, that any large gains have been reached in bringing about such equality so proclaimed but never attained. When our declaration was made, the thirteen colonies represented held slaves by their local laws, and eleven years afterwards, these colonies adopted our constitution, and became the United States. By this constitution the institution of human slavery was recognized; the right of one man to own another was permitted, and men did own slaves and breed them for servitude and the slave market. Such an outrageous wrong was permitted to exist in this our country for

many years, until it was washed out in a sea of blood. This is only one of many wrongs tolerated by our organic law. Its framers also made a grand declaration in its preamble, in which they claimed their purpose was "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defences, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The constitution provides for three co-ordinate branches of our republican government; the legislative, the executive and the judicial, each having its particular part to perform. Much can be said in praise of every branch of the government and many just criticisms can be made where the framers did not have in view the boasted equality of all, nor the welfare and blessing of themselves and their posterity. They proposed "to established justice," and as it became more the duty of the judiciary to see that the law was enforced and that every man had his wrong righted, it will be well to examine as to how far the judiciary have carried out the proclamation and preamble of the constitution in establishing justice in its courts. Only a limited jurisdiction was reserved to the Federal courts, for by the constitution they were to have original exclusive jurisdiction over cases connected with the government and over admiralty cases, concurrent jurisdiction over a large class of common law and equity cases, and appellate jurisdiction both as to law and fact, with such exceptions and under such restrictions as congress might make.

After the declaration had been made that "all men were created equal, having certain unaliable rights," and the constitution had been made "to establish justice, and promote the general welfare," the judicial power having been constituted one of the co-ordinate branches of the government, it would be most natural to suppose, that in this department, the equal rights of all men would be fully recognized and secured to them, and that even-handed justice would be established among all classes and conditions of men.

Has the judicial power been so exercised? Let us see. In accordance with the power vested by the constitution in congress, the latter in 1789 limited by law, the appellate jurisdiction of the Supreme Court in cases of common law and equity, to cases in which the matter in dispute, exclusive of costs, should exceed the sum of two thousand dollars. If the supreme is the best and most competent court, no litigant, unless he be fortunate enough to have that amount, can have the judgment of the best court. If a man were worth only one hundred dollars and that happens to be in litigation, he cannot have

the judgment of the best court on his case, though it be all he has. His rights are not to be protected so carefully as those of his more wealthy neighbor who happens to have two thousand dollars or more in litigation. Can it be true, that congress meant to announce to the people, that the rights of the people consisted in the amount of money they happened to possess, and that this should be the standard of right and justice in our land of boasted equal rights? It looks so when it says that the man who has two thousand dollars or more in litigation may have the right of adjudication in the highest court of the land and he who only has a smaller sum is denied that right. It is still more repugnant to a free people, when it shall be proclaimed by the highest legislative tribunal, that their rights shall be measured by the standard of dollars and cents. It seems hard that this should be the legal standard of measuring the judicial rights of the citizens of this republic, but it is fast becoming the general law and custom of this our boasted free country. It may be expedient that the jurisdiction of courts should be limited in the amounts over which they should take jurisdiction, but let it not be contended that the people have equal rights when their rights are restricted by the amount involved. Financially, as well as socially, money is the standard of right and wrong, and he who has much has many rights, and he who has none has but few rights which the rich are bound to respect.

The powers of government of this state are divided into three departments: the legislative, executive and judicial, the same as are those of the general government. The judicial power is vested in one supreme court, in circuit courts, in probate courts, and justices of the peace.

"The supreme court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo-warranto, procedendo, and other original and remedied writs, and to hear and determine the same. In all other cases, it shall have appellate jurisdiction only." *Art. VI., Sec. 3, Const.* "The circuit court shall have original jurisdiction in all matters, civil and criminal, not excepted in the constitution, and not prohibited by law, and appellate jurisdiction from all inferior courts and tribunals." It will be seen that the judiciary is not limited in this state as in the Federal courts. A litigant in this state can under the constitution have his case heard in the supreme court as well as in the circuit court, no matter how small the amount is. Our courts are required by the constitution to try

the rights of men; not measured by a money standard merely, but by the rules of justice and equity. Our laws provide for an appeal to the circuit court from the judgment of justice court, which has exclusive original jurisdiction in civil cases where less than one hundred dollars is involved, and any case can be appealed from the circuit to the supreme court. It cannot be truthfully said of the state of Michigan, that it has laws in force which render justice to men according to the amount of money they have involved in a suit, for a suitor can appeal from any court, mediately or immediately, to the supreme court of the state. The constitution and the laws of this state are reasonably just in affording ample redress to all classes and conditions of men. Where the cause of complaint does arise it comes in their application and enforcement.

The framers of the constitution had such an abhorence of the petty lords and titled nobility of the old world, that they provided in it that none should be created or exist here and although no title of nobility can be created, still such a class has grown up, nameless may be, yet with the power and airs of aristocracy. This class is not based on a long line of honorable ancestors, but upon money alone. The members of this class as a rule, hold the official places, and they, with the rich and powerful corporations, rule the whole country. The poor and those of moderate means, nominally have equal voice in electing the officials of the country, but practically they themselves are seldom selected for office and have very little voice in the selection of officials. Money is the ruling power in this country, and since money is the recognized power of elections, it follows that money to a greater or less degree influences the officials when they are elected. The poor do not receive the same consideration and protection from the law as do the rich. In every day life, in the practical on going of events, in effect we have one code of laws for the rich, and another for the poor. The rich are able to hire the most learned and eloquent counsel to represent their cause before the courts. They can select such as are familiar with the particular class of cases—specialists. They can employ many or few as they may think best, not only to apply all the legal talent that may be necessary, but who are so socially or politically connected, that they may have a beneficial and happy influence with the court and jury. They can retain those who may know the secret wires and influences, that may harm or help them in the trial of their causes before the court. On the other hand, the poor man may have little or no money to hire counsel. If he can raise only a

little money, he is compelled to employ such counsel as the little money will retain. Often, for want of proper counsel, his rights are not protected. He loses all.

Again, the rights of the rich litigants, who have suits involving large sums of money or immense property interests, are often and usually given precedence over cases involving moderate or small amounts. Who has not seen this done in many courts of this state. When a millionaire begins a suit against some great railroad corporation for a million dollars, their respective attorneys appear in court to arrange for the trial. They announce the names of a half dozen eminent counsel, who are engaged in the case, and ask and have the case set for trial on any day they may select, without any regard to the right of priority of suits of poor litigants, who are suffering on account of the law's delay. When ordinary cases are set for a day certain, it is understood that they will take their order of trial, but even if a long delay to others is the result, this suit must be commenced on the day fixed upon and continue uninteruptedly until it is finished. When the day arrives and all the eminent counsel are present, each counsel is heard in his turn or out of his turn, at any length, on any topic. No fault is found with the amount of time consumed. Each juror is known, and a detailed history of his family and ancestors is known, from the counsellor or detective, who has been employed for that purpose. Every point of law that can be thought of is raised and discussed. In taking the testimony of the witnesses, days of time are often consumed in the examination of a single individual. After the testimony is all in, no questions are asked as to how much time shall be taken in the argument of the cause. The counsel consume days and sometimes weeks in argueing the law and the facts, and no protest or limit is made or even thought of. This is the law and the practice in the trial court for the rich. The same rule, obtains, to a great degree, in the supreme court. The greater the amount involved in the case, and the greater the eminence of the counsel in ability and social standing, the greater is the time granted for oral argument. The decision is long and learned in proportion to the amount involved, and the reputation and eminence of the counsel engaged in the cause.

The law and the rules of procedure for the poor litigant, is quite different in its application in most of the courts. He must manage his own case, or employ such an attorney as his means will permit. His transactions are small, and often his suits are commenced in the

justice court, and, if he would have an application of the law in securing his rights, he must appeal to the circuit court. There his case must go upon the docket and take its turn for trial. When the business is behind a year or more, the chances are that while he is obliged to wait for the court to pass judgment upon his case, the law's delay has beaten him, although he may finally win his case. When the case is reached for trial, he must proceed with it whether he is ready or not. The court usually inquires how long the case will take, and how much is involved, and never will you see or hear any anxiety expressed as to the real rights of the litigants, except as they are gauged by a money valve. If the amount involved in the case happens to be small, no matter how much wrong or oppression the litigant has suffered, this is entirely overlooked and he is made to feel that it is very presumptuous on his part to bring a matter of so small importance into that court, and often remarks are made by the court in the hearing of the jury, that the case ought never to have been brought there. In every word and by every movement of the court, the litigant is fully informed that the amount is so small, and the case is of so little importance, that the county cannot afford to spend much time on it. Even if the suit is brought by a poor man against a rich railroad company to recover damages for the negligent killing of plaintiff's only cow, it is just the same. A pass in the pocket of the court, or some social consideration, makes him guard with scrupulous care the rights of the oppressed railroad company. The time of the high railroad officials cannot be taken up with such insignificant matters. The trial must proceed at once and with the utmost rapidity. For lack of money to compel the attendance of the most important witnesses, the poor must often get along as best he may without their testimony, and the wealthy or powerful corporations are often able to use men in their employ at places where they cannot be reached by subpœnas. When the trial has begun, the defendant in some instances has been known to have friends of the jury interview them. This however is seldom a part of the procedure. The superior ability of the counsel for the wealthy man or powerful corporation, and his intimate and social relations with the court, enables him so to manipulate and manage the case, and to interpose so many technical objections, that the case becomes hopelessly tangled and mixed, and if by chance an unfavorable verdict is obtained, it can easily be reversed. In a large proportion of such cases the counsel for the wealthy man or corporation asks the court to direct a verdict for them, and where there is any pretext for

so doing, the request is granted. If, however, the court concludes to let the case go to the jury, he often makes known to the jury that it is his will that they shall find as his personal interest dictates. The above course of procedure can be seen in many courts of justice, in this and many other states and countries. It is not pretended that all judges are corrupt or dishonest, nor that anything like a majority of them are, but it is a fact, that in too many court rooms justice no longer sits blindfolded with the scales of justice in her hand. Many judges have no adequate conception of the responsibility and importance of their office, and many more are so under the influence and control of their environments, that they cannot act impartially, and many more are absolutely corrupt and dishonest. Money is king and they are loyal subjects to it, and to the influences it controls. The poor are entirely lost sight of. Only the other day an honest and eminent judge when he was delivering an address, in his utter disgust with the partial, craven and corrupt conduct of some courts of justice he had known said:

"A circuit judge has greater power than it is safe to confide to any man, and it is a power for good or for evil. Every right that a man has in property, in good name, in liberty, in the inheritance of his children, or the love of his wife, comes daily in review before the courts, and by an emphasis here, or an emphasis there, by a lack of courage, by an attempt at favor, injustice may be done, and there is absolutely no remedy."

"An astute judge, by an inflection of his voice, or by a smile or a frown may turn a case this way or that way, and the sharpest lawyer in the world cannot take an exception to it and make it stick. Such things have been known to occur and they are well known among the members of our profession."

Here is evidence, both competent and material, from one who knows. He might have said, and would say that the discrimination was in favor of the rich, as against the poor, for when such things are done they spring from motives, and the motives that actuate a partial judge are the same that move other corrupt men. These great wrongs are not confined to any particular court or class of courts, but they pervade all classes of courts from the lowest to the highest.

Oh for laws and courts which shall protect the rights of men, on the basis of eternal right and justice, and not on the basis of money rights only!

# COINAGE LEGISLATION IN THE UNITED STATES.*

HARRY D. JEWELL.

Both the articles of confederation† and the constitution‡ vested in the congress of the United States sole power and exclusive authority to coin money and to regulate the value thereof. By the constitution the states were not only forbidden to coin money, but were also denied the right to emit bills of credit, or to make anything but gold and silver coin a tender in payments of debts. Congress has exercised its prerogative frequently.

By the act of April 2, 1792, the United States mint was established at the seat of government for the time being, the officers and their duties prescribed and provisions made for the operation of the mint. It provided for the coinage of eagles, half eagles and quarter eagles in gold, and of dollars, half dollars, quarter dollars, dimes and half dimes in silver. The silver dollar was given the same value as the Spanish milled dollar then current, and it was provided that it should contain 371 4-16 grains of pure, or 416 grains of standard silver.

The standard of all silver coins was fixed at 1485 parts fine to 179 parts alloy, the alloy to be wholly copper. The proportional value of gold to silver in all coins was made fifteen to one. Persons owning gold and silver bullion were permitted by the act to bring the same to the mint for coinage; the bullion so brought to be assayed and coined as soon as possible, free of expense, and the owners thereof to thereupon receive coins of the same species of bullion, weight for weight, of the pure gold or silver contained. The owners of the bullion and the director of the mint were given mutual option, however, to make an immediate exchange of coins for standard bullion; and the secretary of the treasury was authorized to furnish the mint with money for that purpose. In case of immediate exchange a deduction of one half per cent. from the weight of the coins was made, as an indemnification to the mint for

*NOTE.—So much having already been written upon the financial problem, no discussion of the subject is attempted in this article. It is simply a brief historical review of the coinage legislation in this country.

†Article IX.

‡Article I, Section 8, Paragraph 5.

the time for coining the bullion and for advancing the coins. The amount realized by this deduction was constituted a part of the fund for the defraying of the expenses of the mint. The act further prescribed the devices the coins were to bear, made them legal tender for all payments whatsoever and fixed the penalty for debasing the coin.

Further provisions for the maintenance of the mint at Philadelphia, giving it additional officers, etc., was made by the act of March. 3, 1794, and the acts of March 3, 1795. By the act of March 3, 1801, it was directed that the mint remain at that place until March, 1803.

This act was continued in force for an additional period of five years by the act of March 3, 1803; for a further period of five years by the act of March 3, 1808; again for a like period by the act of December 2, 1812; again by the act of January 14, 1818, and again by the act of March 3, 1823. It was practically permanently established by the act of May 19, 1828, which provided for its continuance at that place until otherwise provided by law.

A branch mint for the coinage of silver and gold was established at New Orleans, and one for the coinage of gold only at Charlotte, N. C., by the act of March 3, 1835. The mint in San Francisco was established by the act of July 3, 1852; the mints of Carson City and Denver, and the United States assay offices at New York, Boise City, Idaho, and Charlotte, N. C., by the act of 1873.

To make a synopsis of the coinage laws complete it will be necessary to refer, briefly at least, to quite a number of miscellaneous laws that have been enacted from time to time, all of more or less importance.

Several acts were passed during the earlier period of national existance, regulating foreign gold and silver coins, making them legal tender, establishing their value, etc. The dates of these acts were: February 9, 1793; February 1, 1798; April 10, 1806; April 29, 1816; March 3, 1821; March 3, 1823; June 25, 1834; and March 3, 1843. By the act of February 21, 1857, all acts making foreign coins currency or legal tender were repealed.

Acts providing for and regulating copper coinage were passed May 8, 1792; January 14, 1793; April 24, 1800; February 21, 1857; and April 22, 1864, The act of March 3, 1871, provided for the redemption of copper and token coins.

Other miscellaneous acts were passed as follows:

Authorizing the coinage of gold dollars and double eagles: March 3, 1849.

Providing against counterfeiting: April 21, 1806; June 8, 1864; January 16, 1877; and February 10, 1891.

Providing for coinage of silver three-cent pieces: March 3, 1851, and March 3, 1853.

Providing for coinage of nickel three-cent pieces: March 3, 1865.

Providing for coinage of nickel five-cent pieces: May 16, 1866.

Authorizing coinage to be executed for foreign countries at the United States mint: January 29, 1874.

Authorizing the Secretary of the Treasury to receive deposits of gold and issue therefore gold certificates of not less than twenty dollars: June 22, 1874.

Authorizing coinage of silver twenty-cent pieces: March 3, 1875; discontinuing same: May 2, 1878.

Providing for redemption of fractional currency: April 17, 1876.

Making superintendents of mints and assayers in the assay offices assistant treasurers of the United States: June 8, 1878.

Providing for the exchange of subsidiary coins and making them legal tender for sums not exceeding ten dollars: June 9, 1879.

Authorizing receipt of gold coin, in sums of not less than five thousand dollars, to be made into gold bars of the same value: May 26, 1882, and March 3, 1891.

Providing for the free transportation of silver coin: August 7, 1882, and subsequent appropriation laws.

Discontinuing the coinage of one-dollar and three-dollar gold pieces, and three-cent nickel pieces: September 26, 1890.

Providing for new designs of authorized devices for United States coins: September 26, 1890.

Providing for the appointment, by the President of the United States, of five commissioners to an International Monetary Conference, to secure fixity of relative value between gold and silver as money: August 5, 1892.

Providing for the coinage of the "Columbian Half Dollar": August 5, 1892.

Providing for the coinage of souvenir quarter dollars for the payment of ten thousand dollars of the appropriation for the board of lady managers of the World's Columbian Exposition: March 3, 1893.

The more important coinage laws, those relating particularly to the coinage of gold and silver, will now be considered, briefly and chronologically. The next law of importance, after the first act

referred to, was the act of March 3, 1795. By that act the treasurer of the mint was directed to retain two cents per ounce from every deposit of silver bullion below the standard of the United States; and of such grade of bullion he was not obliged to receive a less quantity than 200 ounces.

By the act of June 28, 1834, the number of grains of pure gold in an eagle was reduced to 232. This was a reduction of 15 1-2 grains from the weight established by the first coinage act, for by that act the weight was 270 grains, of which 1-12 was alloy, leaving 247 1-2 grains of pure gold. The value of gold coins coined previous to the act of 1834 was fixed at 94.8 cents per penny weight. If my arithmetic is not at fault this would make the actual value of gold eagles coined previous to the act of 1834 to be $10.66 1-2. This act further provided that depositors of standard gold or silver should receive coin therefor within five days, less a reduction of 1-2 per cent. But this deduction was not to be made unless the advance of coin was required by the depositor within forty days.

Probably the most important act passed after the first coinage act was that of January 18, 1837. That act revised and added to the provisions for maintaining and operating the mint, the devices coins were to bear, etc. It made the standard of both silver and gold coins nine parts pure metal to one part alloy. This increased the amount of pure gold in an eagle to 232.2 grains, but left the amount of pure silver in a dollar the same, viz: 371 1-4 grains. All silver coins, whether coined before or after the act, were made legal tender; but only such gold coins as were coined after July 31, 1834, were so constituted. Owners of gold and silver bullion were permitted to deposit the same for coinage, the only limitation being that deposits of less value than $100 or of bullion so base as to be unsuitable for the operations of the mint, might be refused. The act provided minutely as to the manner of receipting for, assaying, and refining the bullion; for testing of coins, allowance for waste, etc., and for the payment to depositors, in the order of the deposit, if so demanded, in coins of the denomination desired by the depositor, unless impracticable and inconvenient to do so, in which case the denominations were to be designated by the director. For the purpose of enabling the mint to make returns to depositors with as little delay as possible, the secretary of the treasury was required to keep a deposit of public money on hand out of which depositors of bullion might be paid as soon as possible after its value had been ascertained.

Three acts of considerable interest and importance were passed in 1853. By the act of February 21, of that year, the treasurer of the mint was directed to purchase silver bullion, with the bullion fund of the mint, and to have it coined into half-dollars of the weight of 192 grains each, and lesser coins of proportionate weight, which were to be paid out in exchange for gold coins at par in sums of not less than $100. The profit, derived being the nominal value of the coins over their intrinsic value (or cost of the bullion), to be transferred to the account of the United States treasury. This same act provided for the coinage of three-dollar gold pieces. It also gave depositors the option of having their gold and silver cast into ingots. This act, was put into effect sooner by the act of March 3, of the same year, which provided more minutely as to the size and devices of the subdivision coins thereby authorized. By another act of the same date the assay office at the city of New York was established.

The act which made the most important changes in the previously established laws was that of February 12, 1873. By that act the gold dollar, at the standard weight of 25.8 grains was made the unit of value, and the gold coins were made full legal tender at their nominal value. The silver coins provided for by this act were a trade dollar, of the weight of 420 grains (or 378 grains pure) and subdivision coins of proportionate weight. Silver coins were made legal tender at their nominal value only to the amount of five dollars. Owners of gold bullion of the value of $100 or more were permitted to deposit the same at any mint and have it formed into coin or bars for their benefit; the charge for so converting into coin was 1-5 per cent. Owners of silver bullion were permitted to deposit the same to be formed into bars or trade dollars, but not for other coinage. The silver bullion for coinage authorized by this act was to be purchased with the bullion fund; the price, terms and quantity to be approved by the director of the mint. The gain arising therefrom, or seigniorage was to be credited to a special fund denominated the silver-profit fund, and the balance to the credit of this fund paid, at least twice a year, into the United States treasury. This act provided for several branch mints and assay offices, and minute details as to their management.

The act of January 14, 1875, provided for the coinage of silver coins of 10, 25 and 50 cents, for the purpose of reducing the fractional currency of similar denominations or "shin plasters," as they were popularly termed. The fractional currency so received was

made a sinking fund by act of April 17, 1876. It repealed the limit to the aggregate amount of circulating notes of national banking associations, and also the law for the withdrawal and redistribution of national bank currency among the several states, and permitted both old banking associations and new ones to be organized, to increase their circulating notes without respect to said aggregate limit. It was made the duty of the secretary of the treasury to redeem the legal tender United States notes, in excess only of $300,000,000 to the amount of 80 per cent. of the sum of national bank notes so issued, and to continue such redemption until there was outstanding the sum of $300,000,000 of such legal tender United States notes, and on and after January 1, 1879, to redeem in coin the United States legal tender notes at the office of the assistant treasurer of the United States in New York, in sums of not less than $50.

The act of July 22, 1876, provided for the coinage of silver to an amount not exceeding $10,000,000, to be exchanged for legal tender notes; the notes so received to be kept as a special fund and re-issued only upon the retirement and destruction of a like sum of fractional currency. It was further provided by this act that the trade dollar should be no longer legal tender, and its coinage was limited. The amount of subsidiary silver coin authorized to be coined was increased to $50,000,000, and the secretary of the treasury authorized to purchase bullion for the same at the market price, unless it could not be coined at that rate without loss to the treasury. The gain, or seigniorage, arising from such coinage was to be paid into the treasury. The act contained a special proviso, however, that the amount of money so invested exclusive of the resulting coin should not exceed the sum of $200,000.

The act of February 28, 1878, provided for the coinage of silver dollars of the weight of 412 1-2 grains of standard silver, to bear the devices and superscription provided for by the act of 1837, and to be legal tender at their nominal value unless otherwise stipulated by contract. The secretary of the treasury was authorized to purchase not less than $2,000,000 nor more than $4,000,000 worth of silver bullion per month for this purpose. The seigniorage was to be accounted for as in preceding acts. The limit of amount which might be so invested in silver bullion, exclusive of resulting coin, was increased to $5,000,000. The president of the United States was authorized by this act to invite the countries composing the Latin Union and other European countries to a conference with the

United States to adopt a common ratio between gold and silver, and provided for the appointment of commissioners for that purpose. An act with similar object was subsequently enacted, as noted elsewhere. This act further authorized the issuance of silver certificates for $10 or more, to be given in exchange for a like amount of silver coin, which should be retained in the treasury for payment of the certificates on demand. By the act of June 19, of the same year, the secretary of the treasury was authorized to use coin certificates for payment of depositors of bullion at the several mints and assay offices.

The issuance of silver certificates of one, two and five dollars was authorized by the act of August 4, 1886.

The law authorizing the coinage of the trade dollar was repealed by the act of February 19, 1887. A period of six months after the passage of the act was allowed, however, during which they would be received and standard silver dollars or subsidiary coins of equal value given in exchange therefor. The trade dollars so received were then to be recoined into standard silver dollars or subsidiary coins.

The act of July 14, 1890, generally know as the Sherman law, directed the purchase by the secretary of the treasury of silver bullion to an amount not exceeding 4,500,000 ounces per month, at the market value, providing it did not exceed $1.00 for every 371¼ grains, the amount of pure silver contained in a standard silver dollar. In payment therefor treasury notes were directed to be issued, in denominations of $1.00 to $1000.00, which were to be redeemable in coin, on demand, after which they might be reissued. But no greater or less amount of such notes were to be outstanding than the cost of the bullion and the standard silver dollars coined therefrom then held in the treasury, purchased by such notes. It was further directed that 2,000,000 ounces of silver bullion so purchased be coined each month into standard silver dollars until July 1, 1891, and there after as much as might be necessary for the redemption of the treasury notes provided for by the act.

The act provided further that the fund for the redemption of circulating notes of national banks be covered into the treasury, and that their redemption be thereafter made from the general fund. This provision, however, was not to apply to the deposit required by the act of 1874 of every national bank of an amount equal to five per cent. of its circulation. The conflicting portions of the act of 1874 were also expressly repealed.

In August, 1893, a special session of Congress was called, and on August 11, Mr. Wilson of West Virginia introduced a bill to discontinue the purchase of silver bullion as provided by the Sherman law. After a long debate, and the proposal of several amendments, the amendment attached by the senate was agreed upon, passed by both houses, approved by the President, and became the act of November 1, 1893.

This act declared it to be the policy of the United States to continue the use of both gold and silver as standard money and to maintain the parity of the two metals. It concludes as follow: "And it is hereby further declared that the efforts of the government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States in the markets and in the payment of debts."

A considerable portion of the time of the Fifty-third Congress was consumed in the consideration of the Bland Seigniorage Bill and other measures of similar character; but of those proposed measures nothing will be said, it being the purpose of this article to consider only those acts which have become enrolled upon the statute books.

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## *NOTES.*

With this number the MICHIGAN LAW JOURNAL presents a sketch of the life of James F. Joy. He is so well known both here and elsewhere that an article with him for the subject must contain matter which does not concern itself so much with the part he has taken in aiding the progress and advancement of this section of our country—that is already very well known—but rather dwelling on his antecedents and the character which has brought about his success.

We shall hope to present in the future sketches of other prominent men, more especially prominent lawyers and judges of this state. We trust that this feature of the MICHIGAN LAW JOURNAL will prove of interest to our readers.

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Discussed so thoroughly as the Venezuelan controversy has been by the press of the countries concerned, little can be added to the literature on the subject, but the MICHIGAN LAW JOURNAL would like to know one thing concerning the president's message to congress: How much of it was politics and how much was real feeling? The enforcement of the Monroe Doctrine has been a safeguard in the past not alone in the weaker nations of the new world but to the United States itself. The independence of Mexico has been insured by it and our southern border protected from the control of a powerful European nation. The president's message, however intended, has been received with very remarkable and unusual sympathy from the people of the United States. He has reiterated a doctrine always popular and almost vital. The independence of the new world from European control is essential and must be maintained. And yet, was the president's message something which he is ready to stand or fall by?

The nomination of Rufus W. Peckham by President Cleveland to the position of Justice of the Supreme Court, and his confirmation, has met with the unqualified approval of the bar of the country.

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The Bar Association of Detroit recently held a meeting and appointed a committee to consider the revision and change of certain court rules and to propose modifications of statutes regulating the joinder of parties in suits in assumpsit. Mr. James H. Pound was chairman. His view of the joinder of parties is to permit of amendment in the declaration in cases of non-joinder or mis-joinder of parties in suits on contract. This is a move and an important one, under certain restrictions, to the growth and advancement of the the law.

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Since our last issue Harry Hayward has paid the extreme penalty of the law for the crime of murder. Here was a character remarkable in these times of remarkable characters. He has long been a past-master in all kinds of wickedness, vice and crime. His passion for gambling was the key and controlling trait in his character. Starting with a love of ease and the ability to indulge in it, which the possession of money insured, games of chance quickly followed on failing fortunes. The last hope of some men when money, and what money buys begins to fail is not that slow but sure cure for poverty, work, but the begetter of worse fortune—chance. A man who is failing financially and who has gambled even moderately, looks almost unconsciously to blind chance—luck—as a cure. That was Hayward's remedy. He had a good social position, and possessed more than average ability, but his love of self-indulgence was his first step to ruin; gambling once a pastime became a necessity; he must win whoever lost. Whatever suffering was entailed on others, gambling and success in it meant everything to him. It was the best school in the world to inculcate selfishness and to eliminate conscience. He learned well the lesson, and all the better from the fact that he did not exercise his conscience. The arm that is not used wastes away; the conscience that is not exercised fails. This thought is an attempt at explaining how Hayward with his abilities and advantages could fall so low and fail so utterly in realizing the hopes and ambitions which once swayed him. He was a moral degenerate of a remarkable type and his character is worthy the critical study of a Nordau or a Lombroso.

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The recent supreme court decision confirming the authority of the board of estimates of the City of Detroit to control and limit the disbursements made by the common council to the amounts and for the purposes for which the moneys are raised by taxation, is a very

salutary check upon the ordinary methods and tendencies of municipal expenditure.

Prior to the enactment of the law of 1895, the power of the board was at least ambiguous. It seemed reasonable to suppose that moneys raised by taxation, should be devoted to the purposes for which they were raised, and while this was done in the main, nevertheless such was not the interpretation of the common council, which took the liberty to depart from the principle in almost any way it saw fit, and there appeared to be no way to enforce a proper construction. Items and amounts were explicitly disallowed by the board, and the council would have no hesitancy in making use for such items of funds which were appropriated for other purposes. If funds were exhausted the council, contrary to the express provisions of the charter, would borrow or authorize the controller to borrow money to restore the drains on the fund. The next year there would be included in the budget items to pay back these loans, thus taxing the people to pay debts unlawfully contracted and utterly illegal.

In one of these instances where the board of estimates were asked to approve of an item of $60,000.00 to repay an illegal loan, the board took occasion to file a protest with the controller and council, and notified them that in the future the board would not allow such items. The warning was signed by 32 out of 37 estimators, some being absent from the city. An effort was made by the council in the case of allowing extra funds to a poor commission to force the board of estimates to back water on their position, but failed.

Shortly after Estimator Robinson, who had been largely instrumental in bringing about this result, conferred with Geo. W. Pardridge, formerly on the board of estimates, but at this time a member of the State Legislature from Detroit, and a law was drafted with the approval of the local municipal charter committee, amending the charter power of the board of estimates and enlarging its authority in the manner desired. The bill was warmly supported by most of the Detroit members. The council protested against its passage, and some opposition was raised to defeat it, but without success.

The vital portion of the act as passed is this provision:—"The said board shall have the power and it shall be its duty, after careful consideration of the various estimates referred to it, if it shall deem it advisable so to do, to disallow any item, items, or parts of items, in the different funds, as well as in the gross amounts thereof, as the said board may deem advisable, and it shall be unlawful for the common council of said city to create any expenditure or expend any moneys as to items specifically disallowed and disapproved by such board of estimates."

Notwithstanding this law the council utterly ignored and disobeyed it. Thereupon Messrs. James B. McKay, Bethune Duffield and Fred. A. Robinson, the latter as attorneys on behalf of the three

as tax payers, obtained an injunction restraining the payment of certain items disapproved. The injuntion was dissolved in the lower court, but on appeal to the supreme court the latter sustained the board of estimates, declaring the action of the council illegal and void, and enjoining the city from the payment of money for the items disallowed by the board as set forth in the bill.

Mr. Robinson was asked his opinion of the effect of the decision and replied: "The decision emphatically upholds the law, and makes it illegal for the common council to spend money for any purpose specifically disapproved by the board of estimates. It holds that this power, lodged with the board, is not an infringement upon the council's legislative powers, but is one of limitation only. It is a check and safeguard upon the disbursing as well as upon the raising of the city's funds. It will not be any easier for the council to evade this law than any other law. The spirit and letter of the law are so closely associated that it would seem extremely difficult to have a technical compliance and a practical evasion at the same time."

"The board of estimates are elected by the people in the same manner as the aldermen, except that there are five additional estimators at large. The board has nothing to do with making contracts, appointing to or removing from office, making ordinances or disbursing moneys. The members are elected to scrutinize the city's finances and economize when possible; it is the object of their being. Judging from the past work of the board, it has, regardless of schemes or political affiliations, felt this responsibility and conscientiously performed its duty. Thus from the very nature of the office it is fair to presume that the board will continue to exercise its functions for the benefit and advantage of the tax payers, as they are not within the domain of politics, nor under the influences of various kinds that necessarily surround the common council."

## BOOK REVIEWS.

THOMPSON ON CORPORATIONS—Commentaries on the Law of Corporations. By SEYMOUR D. THOMPSON, LL. D. San Francisco: Bancroft-Whitney Company. Six vol., 8vo., $36.00. Vol. V., $6.00.

Judge Thompson's great work is nearing completion. Volume V. is received and we are promised the sixth and last volume in the near future. This volume begins with and concludes title twelve, which treats of the corporate powers and the doctrine of ultra vires. The next general subject treated is corporate bonds and mortgages. In the next title, comprising eight interesting chapters, are considered the torts and crimes of corporations. The civil liability of corporations for torts, their liability for trespass and malicious injuries, for frauds and for negligence, forms the subject of four separate chapters. The author gives a chapter on the profitable discussion of unlawful trusts for the control of corporations and the prevention of competition among them. The five chapters under title fifteen treat of insolvent corporations, in which are discussed many much mooted questions regarding assignments for creditors and especially the preferring of creditors. The next eight chapters are devoted to the dissolution and winding up of corporations. The concluding title is devoted to receivers of corporations. This important subject is exhaustively considered in fifteen chapters.

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JAGGARD ON TORTS—Hand-book of the Law of Torts. By EDWIN A. JAGGARD, A. M., LL. B., Professor of the Law of Torts in the Law School of the University of Minnesota. St. Paul: West Publishing Co. Two vol., 8vo., 130 pp. $7.50.

We confess having feelings almost akin to prejudice when we picked up these two volumes for examination. With such an excellent elementary work as Pollack's, and such thorough treatises as those written by Cooley and Bishop, this work would at first thought seem to be one of the class of superfluous law books. We read the preface critically to see if it contained sufficient apology for its existence, and found that it did. From the very first page one can not but be impressed by the author's evident conception of the subject, and his deep interest in it. There is an originality of thought displayed even upon this old and oft-treated subject. He has wisely accepted the well established theories of best early writers but has not allowed dogmas, and old ideas that have been corrected and changed under the light of progress, to narrow his vision or trammel his judgment. To the student of the subject wherever he is, whether in the law office or law school, whether young or old, no better work is now offered. In it are combined both excellency of material and of arrangement.

GLENN'S INTERNATIONAL LAW—Hand-book of International Law. By Captain EDWIN F. GLENN, Acting Judge Advocate of the United States Navy. St. Paul: West Publishing Co. One vol., 8vo., 478 pp. $3.75

We have heretofore referred, somewhat at length, to the general plan and scope of the "Hornbook Series" of text books which the enterprising St. Paul house is putting upon the market. This is Vol. 9 of the series. Like its predecessors, it is primarily intended for the use of law students. It seems, however, to be equally well adapted for use in all institutions in which the study of the subject is offered. Members of the profession and all others desiring more thorough information on the many important matters coming within the range of the subject will likewise find it to be very interesting and profitable reading. In this bustling age, when law-book writing has come to be followed by many as a regular business, it is refreshing to peruse a book written by one who has evidently been prompted solely by his particular interest in the subject treated. By this we do not mean to say that the professional law-book writers as a class, do not do creditable work. We do believe that the work of preparing a book on a special subject like the one treated in this work can best be done by one whose daily duties and experience have especially fitted him for the task. Captain Glenn's experience as judge advocate, as instructor in military science in the University of Minnesota, his early training in the military academy and subseqnent service with troops, have all tended to direct channels of thought toward this subject.

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STANDARD DICTIONARY OF THE ENGLISH LANGUAGE. New York: Funk & Wagnall's COMPANY, 1895. 2338 pages.

A work of great interest to the literary world is becoming every day better known to all classes of society. The Standard Dictionary has come to stay and Michigan is showing the appreciation of it which its merits deserve. Only a few days ago a freight car ran over the Michigan Central Railroad decorated with banners and informing the people that the car was loaded wholly with Standard Dictionaries. A freight car loaded with copies of a single book! How the whole thing would astonish our ancestors of a hundred years ago and now while it sounds odd, yet it will not astonish. Just as the ordinary freight car or the not extraordinary announcement of its curious load show one result of the progress of civilization for the past century, so the book itself which constituted the load, is an epitome of the literary advance of the English speaking people. It contains within it something of all arts, all sciences, and especially of all literature. The technical terms of all the new professions and branches of science known to the progressive civilization of these *fin de siecle* times is here recorded. Consider the terms used in the application of electricity to the various departments of the social, commercial, and manufacturing life of to-day. They run up into the hundreds. Look in the dictionary of fifty years ago. Where are

they? Fifty years ago! Look in the dictionaries of thirty years ago. Are they there? Yes, some of them, but only a very few.

Let us consider the Standard dictionary and make some comparisons with the other late works in the same department. The Century dictionary is so new that its sale is still going on. It is in six volumes and is a dictionary built on the encyclopedia lines. It is very complete and yet both on the score of expense, and because of its very largeness it is not and will not be the people's dictionary. Although in six volumes, the number of terms in its vocabulary is less by over seventy-five thousand than the number contained in those of the Standard. The former has sought to show the progress and development of the English language, the latter the result and present condition.

Let us note some of the further differences between these two works. The Century is, as has been said, much more expensive and cumbersome. It is more complete if we wish to trace a word through its various shades of meaning to its present use; and it records the various meanings in a chronological order. As an apt illustration of the difference between the two works in this latter particular, notice the treatment of the word "girl." The Century reads as follows: "Girl 1†. A young person of either sex; a child. 2. A female child; any young person of the female sex; a young unmarried woman. 3†. In the language of the chase, a roebuck of two years old, 4. A maid servant [Colloq.]" (†obsolete).

The Standard states: "Girl, 1, A female child. 2. [Colloq.] A young woman to whom one is paying attention; sweetheart. 4†. A child of either sex." (†obsolete).

The former again in the matter of syllabication is in our opinion much inferior to the latter. In fact there is no attempt in the former to show it except in those cases where words are respelled to show pronunciation. In the Standard syllabication is shown always and the double German hyphen used to indicate compound words.

And now let us mention some of the original features of the Standard. The definitions used to explain the meanings of words are new and are not merely copied from other dictionaries. An exceedingly valuable feature too, is that the quotations used to example the meanings of words are accurately located giving the name of the book and the page on which they occur.

The pronunciation of words is another thing to be noted. In the case of words whose pronunciations are in dispute the various dictionaries and other authorities are referred to in a systematic way. A committee consisting of representatives from many of the best educational institutions are also quoted as favoring one or the other pronunciation. The accuracy of the pronunciation is also insured by adopting the use of the Scientific alphabet so long favored by the Philological societies of both England and America. Disputed

spellings are also set forth showing the authorities favoring each form.

Trade and professional names are given space. Out of consideration for lawyers, many law terms not included in the ordinary dictionary are here defined. *Habeas corpus* for instance, cannot be found in Webster's International, although it is given vocabulary space in the Century and in this work as well. A word physicians would look for, "*appendicitis*," having now a well known meaning and at this time much used among all classes of people, cannot be found in Webster's International.

The Standard deserves great praise and credit for a great work well done. Its greatest merit is its originality in many departments. A new idea shows genius if, besides being new, it is proved by time to be true. We believe that the new features of the Standard dictionary will become the regular rules for later works.

A criticism which has been very unjustly urged by some interested persons is that the Standard contains unnecessarly certain indelicate words. This is most unjust as a *criticism*, for there, if anywhere, is the place for them. The question for a lexicographer to ask is not whether a word is nice or not but whether it is in use or not. Trenck says that the dictionary should be the inventory of the language. Charles A. Dano and others to whom the question was put by the Standard as to whether their insertion of these words was an error or not said: "You did right." It may not add to the value of their position but we too say "They did right."

# RECENT MICHIGAN DECISIONS.

CONFLICT OF LAWS—PURCHASE OF GOODS IN FOREIGN STATE—DELIVERY TO CARRIER—WHEN SUFFICIENT TO PASS TITLE—RIGHT OF VENDOR TO INSPECT GOODS—Where one residing in this state purchases goods from a person residing in another state, who is to deliver the goods to a carrier for the purchaser, there being no understanding that the property should not pass until inspected, the title passes upon delivery to the carrier.

The right to inspect always exists and a purchaser can not be required to inspect at the shipping point, but is entitled to a reasonable opportunity after the arrival of the goods. *Kuppenheimer* v. *Wertheimer.* (Nov. 5).

CRIMINAL LAW—VIOLATION OF THE LOCAL OPTION LAW—RETURN OF JUSTICE—EXAMINATION OF JUROR—EVIDENCE AS TO SALES—In cases not cognizable by a justice to try, the complaint and evidence taken need not be in writing and the law does not require that he should state in his return the evidence taken before him.

Where a question put to a juror in his examination on voir dire asked for his desire and leaning and assumed that he had a desire and leaning, it was not error for the court to rule the question out unless the suggestion that he would have a desire to go either way was eliminated.

In a prosecution for a violation of the liquor law, it was not error to admit testimony on sales made prior to the date laid in the information, as tending to show sales on the day in question.

Where a witness whom the prosecution is obliged to call is willing to answer questions put to him by the defense, but is evasive when examined by the prosecution, the prosecution has a right to give him a searching examination.

Where the court in his charge to the jury makes a statement as to the evidence given which connsel consider is prejudicial, the objection must be made at the time the statement is made or at the conclusion of the charge. *People* v. *Caldwell.* (Dec. 10).

ELECTION LAW—DETERMINATION OF JURY AS TO LEGALITY OF BALLOTS CAST.—In a contest over election the jury having returned a finding that certain ballots thrown out by the Board of Supervisors because of distinguishing marks, should have been counted for the reason that such marks were placed upon the ballots after they were cast and after the ballot box was opened, thereby giving relator a majority of the votes cast, a judgment of ouster will be entered in accordance with such finding. *Attorney General ex. rel. Blanck* v. *Howcroft.* (Nov. 5).

FRAUD—BREACH OF CONTRACT CAUSED BY INTERFERENCE OF THIRD PARTY—SHOWING SUFFICIENT TO ESTABLISH FRAUD—DAMAGES—EVIDENCE.—Where one actuated by malice and through false and fraudulent representations induces another to break a contract which would otherwise have been accepted, he is liable to the person injured for the damages caused thereby.

The fact that the defendant had an interest in the subject matter of the contract through his connection with the firm with whom the contract was made would not discharge him from liability, there being no contract relation between the plaintiff and himself. The fact that he had an interest in the business as stockholder would only give him the right to express his opinion freely in regard to the advisability of accepting the material contracted for.

Testimony showing the attitude of the firm toward the material furnished under the contract before the interference of the defendant was properly admitted. *Morgan* v. *Andrews.* (Nov. 5).

INSURANCE—FRAUD—ERRONOUS INSTRUCTION—AFFIDAVIT OF LOSS—EFFECT OF MIS-STATEMENT BY INSURED—In an action on a policy of insurance it is error to in-

struct the jury that where fraud is a defense it must be established beyond a reasonable doubt; in such case fraud need only to be proven by a preponderance of evidence.

Where the insured, in making his affidavit of loss, inadvertently includes property which was not destroyed by the fire, without any intent to defraud the company, such mis-statement will not render the policy void. *Knop* v. *National Fire Insurance Co.* (Dec. 10).

INSURANCE LAW—DELAY IN INSTITUTING SUIT—PENDENCY OF NEGOTIATIONS—WHEN NOT SUFFICIENT EXCUSE.—Where an action is brought on a policy of insurance after the time limited in such policy for the commencement of suit, the delay of the plaintiff cannot be excused on the ground that negotiations were being carried on, it appearing, that such negotiations had terminated five months before the institution of the action. *Shackett* v. *Mut. Ben. Assn.* (Nov. 5.)

LIBEL—PUBLICATION BY A NEWSPAPER OF FALSE STATEMENTS CONCERNING AN INDIVIDUAL—NOT PRIVILEGED—TRUTH OF INTERVIEW REPUBLISHED FROM ANOTHER PAPER A QUESTION FOR THE JURY TO PASS UPON—SUFFICIENCY OF PROOF AS TO TRUTH OF CHARGE.—Publication by a newspaper of false and defamatory matter respecting an individual is not so far privileged, on the ground of public interest in the exposure of wrong doing and crime, as to relieve the publisher from liability.

It is not a sufficient answer to an action based upon such publication to prove that the publisher had reason to believe the allegations to be true, or that there was probable cause to believe them to be true, or that he, acting in good faith, supposed them to be true.

A publication that is libelous per se, is presumed to be voluntary and with malicious motive.

Where the truth of the alleged libel is based upon an article, republished from another paper, containing an interview between the plaintiff and a third person, it is for the jury to determine whether the interview set forth in such article was correctly reported and whether the statements were made as reported in such article. In order to discharge the defendant from liability it is only necessary for them to find from a preponderance of evidence that the charge made was true. *Owen* v. *Dewey.* (Nov. 5).

LIBEL—EVIDENCE—DAMAGES—LIABILITY OF PUBLISHER FOR NEGLECT OF HIS AGENTS—In an action for libel for the publication of an article charging plaintiff with being implicated in a burglary, the defendant's managing editor having testified that he had seen an article in an evening paper of the same date as the publication of the alleged libel, containing an explanation of plaintiff's connection with the burglary and that he had not considered it necessary to publish such explanation, the article in question was offered in evidence under objection.

*Held*:—That it was admissible as bearing on the question of defendant's motive to show what occured when asked to retract and show what knowledge defendant possessed at the time of the request for retraction. Defendants having given notice that they had acted without malice, it was competent for plaintiff to show anything bearing upon that question.

Probable cause to suspect will not excuse an imputation of crime, especially where the truth which would dispel the suspicion is easy of access.

Damages for injuries to the feelings must be regarded as actual damages, and not as exemplary, punitory or vindictive damages. A publication of defamatory matter made where the means of ascertaining the truth are easily accessible, and in the absence of extenuating circumstances or those which tend to excuse the wrong always aggravates the injury.

A publisher is liable for injuries resulting from his own negligence or from the neglect of his agents in the course of their employment. *Long* v. *Tribune Printing Co.* (Dec. 3).

MASTER AND SERVANT—LIABILITY WHERE DANGEROUS APPLIANCES ARE USED—LIABILITY FOR INJURIES RECEIVED BY SERVANT FROM FIRE WHICH HE IS CALLED TO HELP EXTINGUISH—In order to hold a master liable to a servant for injuries resulting from defective or dangerous appliances, it must be shown that he had knowledge of their dangerous or defective condition.

In order to be relieved from liability the master is not required to supply the best materials known, or subject such as he does supply to an analysis to determine what hazard may be incurred in their use.

Where a servant is called upon to assist in extinguishing a fire, the danger from which is apparent to him, the master is not liable for injuries received by the servant while rendering such services. *Burke* v. *Parker, Webb & Co.* (Nov. 19).

PROMMISSORY NOTE—LIABILITY OF ACCOMMODATION ENDORSER—FAILURE TO ENQUIRE HOW ENDORSEMENT WAS SECURED—Bad faith and fraud cannot be imputed to one who accepts a note in the ordinary course of business with no knowledge on his part of any representations made by the maker to an accommodation endorser. One taking such a note has the legal right to assume that the maker has dealt honestly with the endorser and has obtained his signature fairly and without any false representations or concealment of any facts which the law required the maker to disclose. *Campau* v. *Cristy.* [Nov. 26].

RAILROADS—NEGLIGENCE IN RUNNING TRAIN BETWEEN STATION AND TRAIN DISCHARGING PASSENGERS—FAILURE OF PASSENGER TO LOOK FOR APPROACHING TRAIN—CONTRIBUTORY NEGLIGENCE A QUESTION FOR THE JURY—DUTY OF COMPANY TOWARD ONE RIGHTFULLY UPON ITS PROPERTY—PRACTICE.—It is negligent for a railroad company to run a train between the station house and a train opposite the station engaged in discharging and taking passengers, and it is not negligence *per se* to attempt to board a train so standing without looking for an approaching train. It is for the jury to decide whether in view of the invitation to board or alight from the train, a passenger is not entitled to assume that the way is clear. The rule requiring one approaching a railroad crossing to look and listen does not apply in all its strictness to one acting on such invitation.

On having customary and necessary business with those on a train, as one receiving mail, is entitled to the use of the company's premises, and is entitled to the same protection as passengers from injury while thereon.

The fact that the declaration alleged that the mail bags, which it was the duty of the plaintiff to receive, were delivered by the defendant, while the proofs showed that the mail was delivered by the United States mail, will not constitute a fatal variance, no negligence in the throwing of the pouch having been alleged. *Tubbs* v. *M. C. R. R.* (Nov. 19).

SET-OFF—EFFECT OF ACCEPTANCE BY DEBTOR OF MONTHLY STATEMENTS—ARGUMENT OF COUNSEL—EVIDENCE.—Where monthly statements are rendered to a debtor, and the statement so rendered is not objected to within a reasonable time, the acquiescence of the debtor is to be taken that the amount is correctly stated.

The counsel for the plaintiff in his argument to the jury having referred to the character of the defense and not to the standing of the defendant, an arraignment by the defendant's counsel of the plaintiff as a moneyed corporation, an oppressor intent on crushing the defendant, was not warranted.

Evidence of items made by the employes of defendant would not be admissible in the absence of proof of their correctness, their makers not being called. *Pabst Brewing Co.* v. *Lueders.* (Nov. 5).)

TAXES—APPEAL FOR UNJUST ASSESSMENT MUST BE MADE TO BOARD OF ASSESSORS—In accordance with an opinion furnished by the city counselor of Detroit, the Board of Assessors instead of deducting from the capital stock of the plaintiff bank, the amount of certain mortgages owned by it, in each of which it was agreed that the mortgagor should pay the taxes, assessed to each stockholder the amount of his stock at the assessed value of $137 per share. In an action brought to recover the amount paid under protest.

*Held:*—That the claim that the assessors and common council had prejudged the plaintiff's case was not a sufficient excuse for its neglect in appealing to the board of review to be relieved from an unjust assessment. *Michigan Savings Bank* v. *City of Detroit.* (Dec. 3).

TELEGRAPH COMPANIES—ENFORCEMENT OF PENALTY FOR FAILURE TO TRANSMIT TELEGRAM—MERE NEGLECT TO TRANSMIT NOT SUFFICIENT—The penalty allowed by section 8705, Howell's statutes, for failure to transmit a telegram can be recovered only for the wilful withholding of a dispatch as a discrimination against the sender and because of partiality and bad faith, and cannot be recovered for mere failure to transmit without any wrongful motive. *Weaver* v. *G. R. & I. R. Co.* (Dec. 10).

TRUST—ESTABLISHMENT OF TRUST IN REAL ESTATE—HOW CREATED—Complainant and his wife borrowed a certain sum which was used for the purpose of a home-

stead, the title to which was placed in the wife. Complainant on the death of the wife claimed a life interest in the property.

*Held*: That the case falls within the provisions of section 6179, Howell's statutes, providing that an express trust cannot be created except by act or operation of law, or by a deed or conveyance in writing, signed by she party granting the same, or his agent, lawfully authorized in writing. *Chapman* v. *Chapman* (Dec. 10).

TRUSTS AND TRUSTEES—RIGHT OF JUDGMENT CREDITOR TO MAINTAIN ACTION WHERE JUDGMENT DEBTOR IS THE BENEFICIARY OF THE TRUST FUND—REMEDY NOT CONFINED TO THE SURPLUS—SECTIONS 6614 AND 5575 HOW. STAT. TO BE CONSTRUED TOGETHER—FORM OF PROCEDURE—1. Where a judgment debtor is the beneficiary of a trust by which the trustees are required to receive and pay over to him the income of the trust estate, an action may be maintained by a judgment creditor, after the return of an execution unsatisfied, to reach the surplus income of the trust estate, beyond what is necessary for the suitable support and maintainance of the beneficiary.

2. The right of a creditor to maintain such an action exists as well where the trust estate is personal as where it is real property.

3. The remedy of the creditor is not confined to a surplus which has accrued and accumulated in the hands of the trustee. The court may determine what may be a reasonable allowance for the beneficiary, and direct the application of any future surplus to the payment of the judgment until it is fully paid.

4. Sections 6614 and 5575 How. Stat. are to be constructed together and were intended to exempt the principal fund and the beneficial interest of the beneficiary in the income only to the extent of a fair support out of the trust estate.

5. Where no personal decree is asked against either party nor a lien sought to be established upon any property and the relief asked for is simply directions to a trustee and is entirely within the province of the court having jurisdiction of the trust estate, the proceeding should be by petition and not by original bill. *Spring* v. *Randall*. (Nov. 19).

TRUSTS AND TRUSTEES—DUTY OF CREDITOR HOLDING COLLATERAL FOR SECURITY OF THE DEBT—MISAPPLICATION OF TRUST FUNDS—RIGHT OF SURETY TO BE DISCHARGED—Complainant gave a mortgage upon her property to secure one Byles as an endorser upon the paper of her husband and the firm of Carpenter, Judd & Co., of which he was a member. Shortly thereafter Byles took possession of the property under a chattel mortgage given to secure creditors and paid off all the indebtedness except that held by the bank; it being claimed by complainant that sufficient moneys to pay this indebtedness and discharge the mortgage had come into the hands of such trustee, but had been used by him to pay the indebtedness of another firm of which he was a member.

*Held:* That a creditor who has effects of the principal in his hands or under his control for the security of the debt, is a trustee for all parties concerned, and where the effects are lost by the positive act of the creditor, the surety is discharged to the extent he is injured.

A creditor holding collaterals is chargeable with a trust concerning the same for the benefit of the surety where he has notice of the existence of such relation between the parties. *Carpenter* v. *Osborn*. (Dec. 10).

# CURRENT LITERATURE.

The December *North American Review* is filled with articles of timely interest. It opens with a symposium on "The Work of the Next Congress," contributed to by M. W. Hazeltine, and by Representatives Thomas C. Catchings of Mississippi, Jonathan P. Dolliver of Iowa, George N. Southwick of New York, and John C. Bell of Colorado. Ex-Secretary of State John W. Foster writes of the "Results of the Behring Sea Arbitration." Sir Reginald F. D. Palgrove, clerk of the House of Commons, gives an entertaining comparison between that body and the House of Representatives. Theodore Stanton discusses briefly what Congress should do for the next Paris exposition. Under the title "Some Memories of a Great Lawyer," W. W. Watson pays a tribute to the late Charles O'Connor.

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The Hon. David A. Wells begins what promises to be a most valuable series of articles on the "Principles of Taxation" in the December *Popular Science Monthly*. Prof. James Sully contributes the thirteenth of his series on the "Studies of Childhood. Herbert Spencer this month considers the teacher in his series on "Professional Institutions." Among other articles of interest are: "Has Immigration increased Population?" by Sidney G. Fisher; "Why the Sea is Salt," by G. W. Littlehales;" Suggestibility, Automatism, and Kindred Phenomena," by W. Romaine Newbold, Ph. D., and "Professor Forbes on Harnessing Niagara," by E. A. LeSueur, Sc. B.

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In accordance with its custom, *Public Opinion* last month issued a very creditable book number. There would seem to be hardly any chance for improvement in this sprightly weekly. It is no discredit to other periodicals to say that this one offers more real value than any other to the busy reader who wants to keep abreast with the times.

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The *Yale Law Journal* for December is a very fine appearing number of about 50 pages. The leading articles are "The Doctrine of the United States Supreme Court of Property Affected by Public Interest, and its Tenencies," and the Power of Stockholders to Bind a Corporation."

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The *Review of Reviews* for December is up to its usual standard. In times like these it is very gratifying for the average reader to have access to a work such as this which, with its interesting leading article "The Progress of the World," gives each month in concise language the world's history for the preceding month. Its valuable department of "Current Events" gives also without comment the happenings of each day for a like period.

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